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No. 95-___

In The

Supreme Court of the United States

October Term, 1995

FORT SUMTER TOURS, INC.,

Petitioner,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the National Park System Concessions Policy Act, 16 U.S.C. §§ 20-20g, authorize the Interior Secretary to unilaterally increase agreed upon franchise fees during the terms of concession contracts in order to limit profits made by government concessioners?

2. Does a court owe substantial deference to an agency construction of a statute, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), when that interpretation (a) was contained in an informal guidance announcement, (b) unilaterally changed the terms of a government contract to the agency's self-serving benefit, and (c) when that interpretation was specifically disavowed by the agency at the time the contract was made?

LIST OF PARTIES

The parties to this case below are as reflected in its caption. The National Parks Hospitality Association also participated as *amicus curiae*.

RULE 29.6 LIST

Fort Sumter Tours, Incorporated has no parent companies or subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Fort Sumter Tours, Incorporated, respectfully prays that a writ of certiorari issue to review the September 27, 1995, judgment and opinion of the United States Court of Appeals for the Fourth Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Fourth Circuit of September 27, 1995, *Fort Sumter Tours, Inc. v. Bruce Babbitt*, No. 94-1570 (4th Cir. Sept. 27, 1995), is reported at 66 F.3d 1324 (4th Cir. 1995) and is reprinted in the appendix hereto, at App. 1a. A Petition for Rehearing with a Suggestion for Rehearing In Banc was denied by the Fourth Circuit on November 27, 1995. See App. 22a.

The opinion and judgment of the U.S. District Court for the District of South Carolina, Judge Hawkins, presiding, of February 3, 1994, was not reported. See App. 23a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Fourth Circuit of September 27, 1995. A Petition for Rehearing and Suggestion for Rehearing In Banc was denied on November 27, 1995. The Supreme Court has jurisdiction to review

cases from the Courts of Appeals under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The National Park System Concessions Policy Act, Pub. L. No. 89-249, October 9, 1965, 79 Stat. 969 (1965) (codified at 16 U.S.C. §§ 20 to 20g), is reprinted in full in the appendix hereto at App. 40a.

STATEMENT

This case concerns the proper amount of judicial deference to be afforded to an agency interpretation of its statutory authority, particularly when such authority is claimed in order to unilaterally increase fees paid to the agency under a government contract, and when such a right to unilaterally raise fees was specifically disavowed by the agency at the time the contract was made. The specific regulatory context of this case arises from the Department of the Interior's National Park Service (NPS) and its relations with concessioners who operate essential services for visitors to national parks, monuments and sites.

1. a. After the Second World War, visitorship at national parks increased rapidly, placing strains on the limited accommodations available at many of these sites. In order to encourage the construction of much-needed facilities within the Park System, and to limit demands on the public fisc, concessions were negotiated with participants in the private sector. These concessions were characterized by fairly long terms (some more than thirty years), strict requirements about what kinds of facilities and services the concessioner was to

build and to maintain and at what cost to the public, fixed franchise fees (expressed as a precise percentage of gross receipts) to be paid by the concessioner to NPS, and the presumption that if a concessioner satisfactorily fulfilled its duties it would be renewed in its rights at the end of the contract term. See National Park Service, Concessions Policies of the National Park Service, Oct. 13, 1950, reprinted in Park Concession Policy, Hearings before the Subcomm. on National Parks of the Comm. on Interior and Insular Affairs, 88th Cong., 2d Sess. 23-31 (1964) [hereinafter "Park Concession Policy Hearings"]; National Parks - Concession Policies, S. Rep. No. 765, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S.C.C.A.N. 3489, 3495-97 [hereinafter "S. Rep. No. 765"].

The franchise fee policy adopted in the 1950 NPS and Interior Department Report, and later ratified by the House Committees on Interior and Insular Affairs and on Public Lands, S. Rep. No. 765, 1965 U.S.C.C.A.N. at 3497; Park Concession Policy Hearings, at 25, was that the fees were to be fixed as a percentage of gross receipts for a concessioner and that such fees could not later be unilaterally increased by NPS. Concession contracts could, however, allow for subsequent, *mutual* agreement to alter fees at intervals of five years or less during the life of the contract. Park Concession Policy Hearings, at 28.

b. In the early 1960s, Congress began a legislative review and codification of NPS's concession policies. This review culminated in the passage of the National Park System Concessions Policy Act, Pub. L. No. 89-249, October 9, 1965, 79 Stat. 969 (1965) (hereinafter "CPA"). See App. 40a. The statute made clear that the Interior Secretary, in making regulations and providing guidance to the NPS in concluding concession agreements was to do so "in a manner

consistent with a reasonable opportunity for the concessioner to realize a profit on his operation as a whole commensurate with the capital invested and the obligations assumed." CPA, § 3(b), codified at 16 U.S.C. § 20b(b); see App. 42a.

Moreover, Congress instructed in the CPA that

> Franchise fees, however stated, shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular contract or permit involved. Such value is the opportunity for net profit in relation to both gross receipts and capital invested. Consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates.

CPA, § 3(d), 16 U.S.C. § 20b(d); see App. 42a.

Finally, Congress gave specific attention to whether NPS could unilaterally increase franchise fees after a concession contract had been negotiated and signed. The original language of House Bill 5886, which was the basis for the CPA, allowed that "[a]ppropriate provision may be made for periodic reconsideration and adjustment of franchise fees." Relating to the Establishment of Concession Policies in the Area Administered by National Park Service, Report to Accompany H.R. 5886, H.R. Rep. No. 1426, 88th Cong., 2d Sess. 2 (1964) [hereinafter "H.R. 5886 Report"]; see also H.R. 2091, 89th Cong., 1st Sess. (1965). In a communication from the Department of the Interior, dated May 14, 1965, the Secretary suggested that this language be changed to read "Appropriate provision shall be made for

reconsideration of franchise fees at least every five years unless the contract is for a lesser period of time." S. Rep. No. 765, 1965 U.S.C.C.A.N. at 3498.

This language appeared in the final draft of the CPA, § 3(d), 16 U.S.C. § 20b(d); see App. 42a-43a. The Secretary noted, in suggesting the amendment, that it "would bring the provisions of the bill generally in line with the executive branch policy for frequent review of fees charged." 1965 U.S.C.C.A.N. at 3498. The policy referred to by the Secretary was that NPS might unilaterally *decrease* franchise fees during the concession term, but it could not increase those fees without the consent of the concessioner. This was also consistent with the overall thrust of section 20b, the provisions of which all refer to the security afforded concessioners' financial interests and which is appropriately entitled "Protection of concessioner's investment."

2. a. The Petitioner, Fort Sumter Tours, Inc. (FST), has since 1961 served as the only concessioner for the NPS at Fort Sumter National Monument. FST has provided boat transportation services from Charleston to the monument, as well as overseeing the sale of refreshments and souvenirs there. *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1327 (4th Cir. 1995); App. 2a-3a.

In 1986, FST had two years remaining on a 10-year concession contract with NPS. NPS sought to have FST agree to expend its funds in acquiring a larger passenger vessel and constructing a second mainland docking facility. In order to induce it to make such an outlay (in excess of $1.5 million), NPS concluded on June 13, 1986, a new 15-year concession contract with FST to run to December 31, 2000. The agreed concession fee to be charged to FST was 4.25% of FST's annual gross receipts. Id. at 1327, 1334 n.4; App. 3a, 16a.

b. On March 6, 1987, nearly a year after the new concession agreement had been signed with FST, NPS announced an amendment to its Concessions Management Guidelines, National Park Service No. 48 (Release No. 2; Amendment No. 1) (March 6, 1987) [hereinafter "NPS-48"]. This Guideline noted that "[t]he old standard contract language requires that any decision to change a franchise fee during a reconsideration period must be mutually agreed to by both parties. That is, if either party does not agree, no change can be effected in the franchise fee." Id. at ch. 24, at 23. The Guideline announced, however, that this policy (and its consequent interpretation of the CPA) would be altered: the NPS could unilaterally increase franchise fees at five-year intervals during the concession period.

In a related policy shift, NPS announced that it would henceforth seek to limit the profits of its concessioners by raising franchise fees at regular intervals. Franchise fee increases would "be determined by first comparing the concessioner's profitability against the profitability of similar industries." Id. at 16-18. The benchmark of profitability for NPS concessions would be "the medians of similar businesses operating in the market place." Review of Management of Recreational Concessioners on Federal Lands, Hearing before the Environment, Energy, and Natural Resources Subcomm. of the House Comm. on Governmental Operations, 101st Cong., 1st Sess. 52 (1991) (statement of James M. Ridenour, Director, National Park Service) (March 21, 1991).

In 1990 and 1991, NPS began a systematic review of all its concessioners in order to ascertain which would be subject to a unilateral increase in franchise fees. During this period, NPS was authorized by statute to retain fees collected from concessioners for its own account in a National Park Visitor Facilities Fund. See Pub. L. No. 97-433, § 3, 96

Stat. 2277 (1983), codified at 16 U.S.C. § 19bb (authority lapsed in 1989). Nearly 700 businesses were affected by NPS's change in its Standard Contract Language, premised on its new construction of the Concessions Policy Act. In 1988, total gross receipts of these businesses were nearly $500 million, generating $12.5 million in franchise fees for NPS. Concessions Policy of the National Park Service, Hearings before the Subcomm. on Public Lands of the Senate Comm. on Energy and Natural Resources, 101st Cong., 2d Sess. 30 (1990) (statement of James R. Richards, Inspector General, Interior Department).

c. On June 20, 1991, at the end of the first 5-year period under its concession contract with FST, the NPS Regional Director informed FST in writing that it was "considering a renegotiation of your franchise fee," making a specific reference to the new guideline in NPS-48. See *Fort Sumter Tours*, 66 F.3d at 1333; App. 14a. On March 16, 1992, NPS wrote to FST indicating that it was unilaterally raising the franchise fee under the concession contract to 12 percent, nearly a three-fold increase. For the period 1991 through 1994, this decision had the effect of augmenting FST's fee payment from $326,688 to $859,171.

3. a. FST lodged a declaratory judgment petition on April 21, 1993, invoking 28 U.S.C. §§ 1331(a) and 2201 as the basis of the District Court's jurisdiction. FST sought a judicial declaration as to whether NPS had the statutory authority to unilaterally increase franchise fees. NPS responded on June 16, 1993, that its fee increase to 12% should be considered final agency action under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702 and 704.

When FST sought discovery from NPS in order to ascertain the exact means by which NPS had calculated the

increased franchise fee, NPS secured from the District Court a protective order, thus limiting the facts before the court to the administrative record prepared by the agency. See *Fort Sumter Tours*, 66 F.3d at 1327, 1335-36; App. 4a, 18a-19a.

The District Court ruled on February 3, 1994, that NPS had the statutory authority to unilaterally increase franchise fees under the CPA. Citing the standard of review under the APA, 5 U.S.C. § 706(2)(A), the District Court held that NPS's construction of the CPA allowing it to unilaterally increase franchise fees was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See *Fort Sumter Tours*, Dist. Ct. slip op. at 7-8, 14; App. 28a, 34a.

b. Appeal was taken by FST to the Fourth Circuit, pursuant to 28 U.S.C. § 1291. On the issue of whether the NPS had the statutory authority to unilaterally increase concession fees, the Fourth Circuit concurred with the District Court but on significantly different legal grounds. After finding that the CPA provision on franchise fees, 16 U.S.C. § 20b(d), was ambiguous, the Fourth Circuit held that it would give deference to NPS's construction under the rule of *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). See *Fort Sumter Tours*, 66 F.3d at 1329-30; App. 8a.

It is this aspect of the Fourth Circuit's judgment that Petitioner takes exception. Although the Petitioner disagrees with other aspects of the decision, no review is sought here on the balance of the Fourth Circuit's opinion. All of the Fourth Circuit's holdings turn on the deferential treatment of NPS's contradictory and self-serving interpretation of its authority under the CPA to unilaterally raise franchise fees in pursuance of a policy to limit the profits of its concessioners.

REASONS FOR GRANTING THE PETITION

This case concerns the limits of judicial deference to informal, self-serving and contradictory interpretations made by federal agencies of their statutory authority. The National Park Service's (NPS) claim to unilaterally raise concession franchise fees was marred by defects which should have counselled against judicial deference -- respect the Fourth Circuit freely dispensed in its decision. But just as importantly, the policy pursued by NPS of limiting the profits of its concessioners was contrary to Congress' direction in the National Park System Concessions Policy Act (CPA), 16 U.S.C. §§ 20-20g, and frustrated the legislative intent of having the private sector provide quality services and amenities to those who visit our magnificent National Parks, Monuments and Sites.

The critical misstep taken by the Fourth Circuit was to grant undue deference to the agency interpretation of the CPA which, NPS claimed, entitled it to unilaterally increase franchise fees for those concession contracts which were already being performed. NPS simply arrogated to itself the power to rewrite the essential term of a concession contract without the consent of the concessioner. In granting this authority to itself, NPS is now able to force concessioners to perform all of their contractual obligations, but at reduced compensation, thus diminishing the profitability of the concession. NPS's policy reversal jeopardizes the viability of hundreds of businesses around the country, defies the Congressional policy enunciated in the CPA, and, most of all, marks a deeply-disturbing trend in judicial deference to extraordinary agency claims of statutory power.

1. The Fourth Circuit gave a deferential review to

NPS's claim of authority under the CPA that it could unilaterally raise concession fees. The panel relied upon the essential holding of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), that where a statute is ambiguous, "the question then becomes one of whether the interpretation by the agency charged with its administration is a permissible one." Id. at 842-44.

The Fourth Circuit first held that the relevant part of the CPA, the language which appears in 16 U.S.C. § 20b(d) ("Appropriate provision shall be made for reconsideration of franchise fees at least every five years unless the contract is for a lesser period of time."), was uncertain as to the precise question whether NPS could unilaterally increase franchise fees. See *Fort Sumter Tours*, 66 F.3d at 1329-30; App. 8a. Under "step-one" of the *Chevron* analysis, the Fourth Circuit concluded that the CPA was ambiguous.

It is Petitioner's submission, further outlined at 18-20 infra, that this conclusion violated the canon of statutory construction that legislative authority for governmental interference with contracts in pursuit of a policy of profit limitation should be narrowly construed. In short, if Congress had desired that the CPA allow NPS to limit concessioner profits, it must have unmistakably indicated that intent. Absent such an express grant of that authority, none may be implied.

This submission is logically independent of Petitioner's other argument that, irrespective of the underlying rules of statutory construction for provisions like section 20b(d) of the CPA, wide judicial deference to the NPS interpretation was unwarranted. The panel held that NPS's gloss on section 20b(d) was "permissible" and that the agency was, therefore, free to unilaterally increase franchise

fees. See *Fort Sumter Tours*, 66 F.3d at 1330; App. 8a-9a.[1]

Petitioner maintains that *Chevron* deference is unwarranted where there is a confluence of defects in the agency's appreciation of its role in statutory construction. Three such errors are apparent here. The first is that NPS offered its new interpretation of the CPA in an informal guidance setting.[2] When the authoritative nature of NPS-48 was challenged below, the Fourth Circuit seemed to agree that it was lacking in such character. See 66 F.3d at 1334 n.3; App. 15a ("NPS[-48] is not a law or regulation, but rather a guideline for use by the NPS in making calculations."). But, somewhat mysteriously, the Fourth Circuit "[found] no problem with the application of NPS-48 to the agreement at hand." Id.

The second flaw in the agency process of statutory

[1] This esteem for the agency position influenced the balance of the Fourth Circuit's opinion. Once it decided that NPS's interpretation of the CPA was authentic, the panel was obliged to read the June 13, 1986, concession contract between NPS and FST as allowing the agency to unilaterally increase franchise fees during the concession period. See 66 F.3d at 1332; App. 13a.

[2] NPS-48, issued March 6, 1987, first announced NPS's new-found prerogative to unilaterally increase franchise fees. It is merely a policy guidance document issued to concessioners. This policy of unilaterally increasing franchise fees has never been enunciated in a regulation. A revised Standard Concession Contract, containing language suggestive of NPS's newly-claimed power to unilaterally raise franchise fees, did appear at 57 Fed. Reg. 40508 (Sept. 3, 1992). However, the issuance of NPS-48 did not imbue it with any authority beyond that accorded to policy guidance, for "[t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations." *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (Scalia, J.); see also 44 U.S.C. § 1510.

construction was that NPS never explained, when issuing NPS-48, why the agency was altering nearly forty years of regulatory practice. NPS-48 acknowledged that it was, indeed, changing an essential element of concessioner expectations. The Guideline noted that the former policy "require[d] that any decision to change a franchise fee during a reconsideration period must be mutually agreed to by both parties. That is, if either party does not agree, no change can be effected in the franchise fee." NPS-48, at ch. 24, at 23.

The third, and final, blemish on NPS's singular interpretation of the CPA was that it was manifestly self-serving. NPS's new policy meant that it would receive more money from its concessioners. In the period between 1983 and 1989, these moneys would have actually accrued to the agency's own account. See Pub. L. No. 97-433, § 3, 96 Stat. 2277 (1983). This is not a case where a federal agency made a dispassionate decision as to the scope of its regulatory authority. Rather, NPS-48 reflected a more self-interested desire to exact more money from a group of government contractors.

2. This Court's *Chevron* jurisprudence is at a fateful cross-roads. Petitioner does not seek here, however, to unsettle the fundamental public wisdom of that decision. There are many occasions where a court should properly defer to an agency's interpretation of a statute it administers, even when the court's construction of the law would not be the same as the agency's. Nevertheless, substantial inroads have been made into *Chevron*'s grant of extraordinary deference to any agency interpretation of a statute which is "permissible," *Chevron*, 467 U.S. at 842-44, or is merely "rational and consistent," *Fort Sumter Tours*, 66 F.3d at 1330 (quoting *Lewis v. Babbitt*, 998 F.2d 880, 881 (10th Cir. 1993), quoting *Aulston v. United States*, 915 F.2d 584, 589

(10th Cir. 1990), cert. denied, 500 U.S. 916 (1991), or just plain "reasonable." Id. (quoting *Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989), quoting *Chevron*, 467 U.S. at 844).

The exceptions that have been carved out of *Chevron* are all implicated in this case. The three errors in agency judgment featured in NPS's usurpation of authority under the CPA -- 40 years of policy wiped-away, without explanation, by a self-serving interpretation advanced in an informal context -- have, when appearing individually, signalled caution to courts in denying deference to the agency gloss on the statute. In this case, all three pathologies in agency process are apparent. The Fourth Circuit erred in nevertheless granting that deference under *Chevron*.

a. Substantial doubts have been raised in some Circuits whether the *Chevron* standard of deference should even apply in cases (such as this) where it is not at all clear, as a threshold matter, whether an agency has authority to act under a statute. See *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (holding that *Chevron* deference is inapplicable absent express delegation by Congress); *Arent v. Shalala*, 70 F.3d 610, 614-17 (D.C. Cir. 1995) (using "arbitrary and capricious" standard of *Motor Vehicle Mfrg. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

There is a subtle, but significant, discordance between the district court's holding and the Fourth Circuit's. The district court upheld NPS conduct as agency action under the "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" standard of the APA, 5 U.S.C. § 706(2)(A). Dist. Ct. slip op. at 7-8; App. 28a. Without explanation, the Fourth Circuit hinged its decision on *Chevron*, believing that in a case raising a challenge to an

agency's very statutory authorization to act, *Chevron* was *more* deferential to the agency than the standard of review under *Motor Vehicle* or the APA. See also *Arent*, 70 F.3d at 619-20 (Wald, J., concurring).

Petitioner's submission is that NPS has no authority to unilaterally raise franchise fees under the CPA, and that (properly applied) neither *Chevron* deference nor *Motor Vehicle* review should yield that result.

b. The Fourth Circuit acknowledged that NPS-48 was neither "a law or regulation, but rather a guideline for use by the NPS in making calculations" of changes in concession fees. See 66 F.3d at 1334 n.3; App. 15a. NPS-48 is not, therefore, a legislative rule. It is not even an interpretation of a legislative rule adopted as a regulation. At most, NPS-48 can aspire to be a nonlegislative construction of the CPA, although it is by no means clear that NPS-48 was even intended for such a purpose.

In any event, informal interpretive documents like NPS-48 are not entitled to *Chevron* deference. In *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), this Court made clear that *Chevron* deference was not due to an informal agency interpretation of a statute. Instead, the standard of review enunciated in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), applied. This meant that a court would defer to the interpretation depending "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. . . ." 499 U.S. at 257. See also *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). Indeed, this reluctance to grant deference to informal agency interpretations was presaged in *Chevron* itself, when this Court spoke of granting power to an agency

"to elucidate a specific provision of the statute *by regulation*." 467 U.S. at 843 (emphasis added).

There is no mere semantic difference between *Chevron* "step-two" review (granting deference to any "permissible" agency interpretation) and the *Skidmore* standard. The analysis under *Skidmore* is far more inquiring. The Fourth Circuit deliberately granted *Chevron* deference precisely in order to avoid a searching interpretation of the CPA and consideration of NPS's inconsistency in construing it.[3]

c. Had the Fourth Circuit embraced *Skidmore* review in this case, inevitably greater emphasis would have been placed by the court on NPS's unexplained swerve from forty years of practice (24 of which were under the CPA) disavowing unilateral increases of concession fees. The combined teaching of *Skidmore* and *Motor Vehicle* is that agency repudiations of long-standing statutory interpretations are, if not suspect, then to be carefully reviewed by courts. See *Motor Vehicle*, 463 U.S. at 41-42.

This Court has instructed that, when even applying *Chevron* deference, the agency must supply a reasoned explanation for a reversal in its venerable reading of a statute. See *Rust v. Sullivan*, 500 U.S. 173, 187 (1991) (quoting

[3] Courts have badly fractured on the issue of whether *Chevron* deference is mandatory for informal agency interpretive statements. Compare *National Latino Media Coalition v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987), and *Water Quality Ass'n Employees Benefit Corp. v. United States*, 795 F.2d 1303, 1305 (7th Cir. 1986) (declining such deference), with *Prater v. United States Parole Comm'n*, 802 F.2d 948, 954 (7th Cir. 1986), and *American Federation of Gov't Employees v. Federal Labor Relations Authority*, 778 F.2d 850, 852, 856, 861 (D.C. Cir. 1985) (granting it).

Motor Vehicle, 463 U.S. at 42). As was noted in *Good Samaritan Hosp. v. Shalala*, 113 S.Ct. 2151 (1993):

> [An agency] is not estopped from changing a view [it] believes to have been grounded upon a mistaken legal interpretation. . . . On the other hand, the consistency of an agency's position is a factor in assessing the weight that position is due. As we have stated, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."

Id. at 2161 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981))).

In this case, the NPS did not offer such an explanation, nor did the Fourth Circuit seem to require one. The Fourth Circuit (with the Sixth) seems to be in the minority on this point. Cases from four other circuits (D.C., Third, Ninth and Tenth) have held that the *Motor Vehicle* test, endorsed in this Court's decision in *Rust*, must be applied at "stage two" of the *Chevron* analysis.[4]

[4] Compare *Mobil Oil Corp. v. EPA*, 871 F.2d 149, 154 (D.C. Cir. 1989); *Sacred Heart Medical Center v. Sullivan*, 958 F.2d 537, 544 (3d Cir. 1992); *Mazza v. Secretary of Dep't of Health & Human Services*, 903 F.2d 953, 959 (3d Cir. 1990); *Flagstaff Medical Ctr., Inc. v. Sullivan*, 962 F.2d 879, 886 (9th Cir. 1992); *Seldovia Native Ass'n Inc. v. Lujan*, 904 F.2d 1335, 1346 (9th Cir. 1990); *Exxon Corp. v. Lujan*, 970 F.2d 757, 762 n.4 (10th Cir. 1992); with *Fort Sumter Tours*, 66 F.3d at 1330; App. ~~8a~~-9a; and *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339 (6th Cir. 1994), cert. denied, 116 S.Ct. 50 (1995).

This issue has been squarely raised in a case now pending before this Court. See *Colorado Republican Federal Campaign Committee v. FEC*, No. 95-489, at Pet. i, 23-24 (Cert. granted Jan. 9, 1996), 64 U.S.L.W. 25. That case concerns the judicial deference given to inconsistent advisory opinions issued by the FEC. Among the issues raised by Petitioner was whether, in the absence of a "reasoned explanation" for the change in interpretation, as required in *Rust*, such inconsistent opinions were to be denied *Chevron* deference. See id. at 24.

d. That NPS's interpretation of the CPA was informal and inconsistent should have been reason enough for the Fourth Circuit to not have granted it *Chevron* deference. But it is also material that the agency's interpretation was self-serving in a palpable and immediate way. The D.C. Circuit has consistently held[5] that *Chevron* "deference may be inappropriate. . . . where the agency itself were an interested party to the agreement, [and where] deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract." *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir.), cert. denied, 484 U.S. 869 (1987). Accord *TransOhio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992).[6]

[5] This "self-serving" exception to *Chevron* deference has not received universal acceptance by other courts. Cf. *California Energy Comm'n v. Bonneville Power Admin.*, 909 F.2d 1298, 1306 (9th Cir. 1990), cert. denied, 500 U.S. 904 (1991).

[6] The issue raised in *TransOhio*, the propriety of OTS denying the regulatory forbearance agreed to in earlier contracts with certain savings and loans, is now before the Court in *United States v. Winstar Corp.*, No. 95-865 (Cert. granted Jan. 23, 1996), 64 U.S.L.W. 27.

The issue here is whether NPS is free to advance a "post hoc reinterpretation of its contract," id., with FST. At stake is nothing more or less than the propriety of a government agency later changing the terms of a contract for which it has bargained.

e. Once again, Petitioner has no desire to challenge the public wisdom of the broad contours of the *Chevron* holding. Rather, it would be Petitioner's submission to this Court that if two or more of the following factors are apparent, then *Chevron* deference should be presumptively unwarranted: (1) the agency has sought to advance an interpretation of its statutory authority through informal guidance mechanisms; (2) the agency's interpretation manifestly contradicts its earlier, long-standing constructions without a reasoned explanation for the deviation; and (3) the agency is seeking to advance a self-serving statutory interpretation with the effect of modifying the essential terms of a contract into which it has already entered.

3. Congress could not have desired the interpretation of the statute made by the NPS and the Fourth Circuit to limit the profitability, efficiency and services of concessioners.

The government may limit the profitability of companies doing business with it -- but only with explicit Congressional approval. *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 309 (1942). As a result of the Court's decision in ***Bethlehem Steel***, Congress enacted profit limitations on defense contracts in the Renegotiation Act of 1951, 65 Stat. 7 (1951), *as amended*, 50 U.S.C. App. §§ 1211-1233 (1964) (repealed 1978). This law explicitly aimed to eliminate the excessive profits from contracts with the United States. Renegotiation Act of 1951, § 101, 65 Stat. at 7. By 1964, Congress had included contracts made with the

Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the Maritime Administration, the Federal Maritime Board, the General Services Administration, the National Aeronautics and Space Administration, the Federal Aviation Agency and the Atomic Energy Commission within the ambit of the Renegotiation Act of 1951. 50 U.S.C. App. § 1213(a) (1964).

Congress did not, however, extend the Renegotiation Act of 1951 to all areas of the government. Particularly, the Eighty-Ninth Congress did not extend the provisions to include National Park concessioners. Congress certainly could have done so when it later amended the Renegotiation Act. See Act of June 30, 1966, Pub. L. 89-480, 80 Stat. 232. Instead, Congress created the separate regulatory regime of the CPA.

In order to correctly interpret the CPA, it should be read *in pari materia* with the Renegotiation Act of 1951 because the same Congress worked on both laws regarding the rights of government contractors. See *United States v. Stewart*, 311 U.S. 60, 64 (1940) (holding all acts *in pari materia* are to be taken together, as if they were one law). Similar statues that are to be read *in pari materia* should be harmonized. *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring). In the present case, the direct mandates of Congress can only be brought into harmony by rejecting the NPS interpretation of the CPA.

Congress could not have intended to limit profits on CPA-based contracts in the same manner as it clearly did with contracts subject to the Renegotiation Act of 1951. The statutes facially address the issue of profits differently. The CPA does not explicitly limit profits. Rather, it provides a concessioner a "reasonable opportunity. . . to realize a profit.

. . commensurate with the capital invested and the obligations assumed." 20 U.S.C. § 20b(b). Compare Renegotiation Act of 1951, § 105, 65 Stat. at 12-17. Moreover, the CPA only provides for "*reconsideration* of franchise fees at least every five years." 16 U.S.C. § 20b(d) (emphasis added). Congress had the opportunity in drafting the CPA to track the language of the Renegotiation Act, and chose not to.[7] NPS's policy of limiting a concessioner's profits to an industry standard is contrary to the clear language and intent of the CPA.

Petitioner's submission is that if Congress had desired in the CPA to allow NPS to unilaterally raise franchise fees in order to limit concessioner profits, explicit statutory language (as in the Renegotiation Act) was required. This canon of construction demands that a clear statutory signal be sent to a class of government contractors that an agency has the authority to unilaterally change essential contract terms without recourse. Explicit statutory language gives fair notice to prospective government contractors. The CPA lacks such notice, and may not be fairly construed to allow NPS to unilaterally raise franchise fees.

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[7] The Renegotiation Act of 1951 also called for a Renegotiation Board to "endeavor to make an agreement with the contractor or the subcontractor with respect to the elimination of excessive profits." § 105(a), 65 Stat. at 12. Failing this, the act required the Renegotiation Board to issue an order determining the amount of excessive profit. Id. Unlike the NPS interpretation of the CPA, the Renegotiation Act allowed an appeal from the Board's unilateral decision to the Tax Court of the United States. § 108, 65 Stat. at 21.

CONCLUSION

For the foregoing reasons, this Petition ought to be GRANTED.

Respectfully submitted,

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February 22, 1996

Appendices

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FORT SUMTER TOURS, INCORPORATED,
Petitioner-Appellant,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent-Appellee.

NATIONAL PARK HOSPITALITY ASSOCIATION,
Amicus Curiae.

No. 94-1570

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
Falcon B. Hawkins, Chief District Judge.
(CA-93-918-2-1AJ)

Argued: May 1, 1995

Decided: September 27, 1995

Before ERVIN, Chief Judge, MURNAGHAN, Circuit Judge, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Judge Murnaghan wrote the opinion, in which Chief Judge Ervin and Senior Judge Young joined.

COUNSEL

ARGUED: Marvin DeWitt Infinger, SINKLER & BOYD, P.A., Charleston, South Carolina, for Appellant. John Harris Douglas,

Assistant United States Attorney, Charleston, South Carolina, for Appellee. **ON BRIEF:** George E. Campsen, Jr., CAMPSEN & CAMPSEN, Charleston, South Carolina, for Appellant. J. Preston Strom, Jr., United States Attorney, Charleston, South Carolina, for Appellee. Henry L. Diamond, Fred R. Wagner, Scott F. Belcher, BEVERIDGE & DIAMOND, P.C., Washington, D.C., for Amicus Curiae.

OPINION

MURNAGHAN, Circuit Judge:

Fort Sumter Tours, Inc. ("FST") provides public boat transportation in Charleston, South Carolina under a concession arrangement with the United States Secretary for the Interior ("Secretary"), pursuant to a contract between FST and the National Park Service ("NPS"). Under the contract, FST is required to pay a franchise fee to the Secretary equal to a determined percentage of FST's annual gross receipts; the contract provides for reconsideration of the franchise fee at five-year intervals. After five years had passed on FST's present contract, NPS notified FST that it wished to renegotiate the franchise fee. FST objected to the proposed fee change, but refused to engage in discussions with NPS. After an investigation, NPS adopted a significantly increased franchise fee. When FST challenged the fee in the district court, the court affirmed NPS's decision to raise the franchise fee. FST appeals, and we affirm.

I. *Factual Background*

The Fort Sumter National Monument ("the Monument") is located in Charleston Harbor, South Carolina. NPS, which administers the Monument for the Secretary, organizes the provision of facilities and services for the public at the Monument by entering into concession contracts with private companies. FST is one such company. FST's contract with NPS provides that FST will furnish boat transportation services to and from the Monument. The concession contract requires FST to operate two mainland docking facilities and to provide sightseeing vessels; NPS maintains the Monument and a suitable dock at the Monument.

The concession relationship between the FST and NPS began on July 13, 1961, when NPS first selected FST to operate the boating facility. The present contract, entered into on June 13, 1986 with an expiration date of December 31, 2000, is the fourth in a series of concession contracts between FST and NPS. Section 9(a) of the present contract calls for FST to pay a franchise fee to the Secretary in the amount of 4.25% of FST's annual gross receipts. Section 9(e) of the contract further authorizes reconsideration of the fee at the end of each five-year period at the request of either party to the contract. If such a request is timely made (within sixty days after the end of a five-year period), the parties may negotiate the modification; if they cannot agree, however, NPS makes a final decision as to the franchise fee modification. The contract includes a provision for the appointment of an advisory arbitration panel to make a recommendation to NPS regarding the fee adjustment. Any new fees established are retroactive to the beginning of the five-year period for which a reconsideration of fees was sought.

In a letter of June 20, 1991, the NPS Southeast Regional Director notified FST that NPS was considering renegotiating the contractual franchise fee. NPS prepared a franchise fee analysis on February 27, 1992, which concluded that a 12% franchise fee was appropriate for the five-year period starting on June 13, 1991. FST was advised of the NPS determination by letter dated March 16, 1992; the letter also indicated that NPS was willing to meet with FST to discuss the determination. FST objected to the 12% figure by a letter on March 24, 1992.

Thereafter, an FST attorney sought documents relevant to the fee determination from NPS under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. On May 15, 1992, NPS again invited FST to discuss the franchise fee modification. However, on April 14, 1993, FST advised NPS that, rather than pursuing further negotiations, it intended to ask a court to rule on NPS's authority to increase the franchise fee. FST filed a declaratory action in the United States District Court for the District of South Carolina on April 21, 1993, seeking a ruling regarding the rights and obligations of the parties under the National Park System Concessions Policy Act, 16 U.S.C. §§ 20-20g, and under the relevant concession contract. By a letter dated June 16, 1993, NPS advised FST that, because FST refused to negotiate the fee

and did not wish to avail itself of the advisory arbitration provisions under the contract, NPS had performed an independent review and had determined that a fee of 12% was appropriate. The 12% fee determination became a final decision of the Secretary, and NPS requested payment of the fee amount from FST. FST's suit then became an administrative appeal of the Secretary's final decision, over which the district court had jurisdiction by virtue of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

Shortly after filing suit, FST attempted to depose several NPS employees. NPS moved for a protective order which was granted in part by a magistrate judge, and then granted in its entirety by the district court upon reconsideration. All discovery was prohibited.

After briefing and oral argument on January 5, 1994, the district court entered an order upholding NPS's decision to raise FST's franchise fee to 12% of FST's gross receipts. FST's motion for reconsideration of the order was denied, and FST appealed. In this Court, FST claims that NPS did not have the statutory or the contractual authority to raise the franchise fee. FST also contends that NPS's notice of its intention to change the fee was inadequate under the contract, and that NPS calculated the 12% fee incorrectly.

II. *Statutory Authority*

NPS claimed authority for its adjustment of FST's franchise fee under both the National Park System Concessions Policy Act ("CPA"), 16 U.S.C. §§ 20-20g, and the concession contract between FST and NPS. To calculate the exact amount of the adjusted fee, NPS further relied on Chapter 24 of the Concessions Guidelines, commonly referred to as "NPS-48," which is an agency guideline developed by NPS in 1986 that establishes a methodology for the calculation of concessioner franchise fees. FST argues that the method used by NPS to calculate the fees challenged in the instant case contravenes both the language and the purpose of the CPA. Specifically, FST claims that (1) NPS, in violation of the CPA, used the adjustment of franchise fees as a way in which to limit FST's profits; (2) while the CPA allows NPS to reconsider fees unilaterally, it does not allow NPS to adjust fees; and (3) section 9(e) of the concession contract, which provides the contractual authority for an adjustment

of franchise fees, does not constitute an "appropriate provision" for the reconsideration of fees as required by the CPA. This Court reviews *de novo* the district court's interpretation of a statute. *C.G. Willis, Inc. v. The Spica*, 6 F.3d 193, 196 (4th Cir. 1993) (citing *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)).

A. *Limitation of Profits*

The CPA authorizes the Secretary of the Interior to contract with private companies in order to provide services to visitors to the National Park System, *see* 16 U.S.C. § 20a; the Secretary administers the provision of these services through NPS. The Act governs the concession agreements between the Secretary and his concessioners, such as the one between NPS and FST. The CPA contains an explicit provision regarding the reconsideration of franchise fees:

> Franchise fees, however stated, shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular contract or permit involved. Such value is the opportunity for net profit in relation to both gross receipts and capital invested. Consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates. ***Appropriate provisions shall be made for reconsideration of franchise fees at least every five years unless the contract is for a lesser period of time.***

Id. § 20b(d) (emphasis added). NPS-48, developed pursuant to the CPA, provides a specific method for calculating franchise fees:

> The appropriate franchise fee for concessioners shall be determined by first comparing the concessioner's profitability against the profitability of similar industries. The concessioner's reported statistics may be adjusted to reflect the value realized by the concessioner. Any known future changes in the financial condition of the operation should be taken into account.

> In order to protect the investments and efforts of the parties involved, a minimum and maximum fee shall be determined thus establishing fee limits.
>
> A fee will be determined within these limits that produces a reasonable level of profitability consistent with the risk undertaken by the concessioner.
>
> As a final test, the impact of this fee should be reviewed to ensure that it is not at a level which will interfere with the concessioner's reasonable opportunity for a profit. Additionally, it should not interfere with the concessioner's ability to charge comparable rates or impact on NPS objectives of preserving and protecting park resources. . . .
>
> . . . .
>
> *The final fee determination is based on this comparison of the concessioner's returns with similar outside industry returns.*

(emphasis added).

FST argues that NPS-48, and actions taken by NPS pursuant to NPS-48, contravene the CPA because the CPA does not allow NPS to consider profits when determining franchise fees. FST claims that the CPA grants NPS discretion over concession matters (*i.e.* details relating to FST's daily operational activity), the exercise of which has an incidental effect on profits, but does not allow NPS directly to adjust fees based on profits. According to FST, only market forces should exert direct control over a concessioner's profits.

FST contends, moreover, that NPS-48 controverts the purposes of the CPA by focussing the franchise fee determination on a comparison of a concessioner's returns with the profits of other companies in the industry. By calculating franchise fees based on such a comparison, FST claims, NPS necessarily tailors concessioner profits to the *average* profitability of other similar companies. FST argues that such a limitation of profits encourages mediocrity and discourages effi-

ciency in the concession industry, although the CPA is designed to protect concessioner investment and encourage efficiency. *See, e.g.*, 16 U.S.C. § 20b(a) (Secretary should "assure the concessioner of adequate protection against loss of investment . . . ."); *id.* § 20e (concessioner acquires a possessory interest in structures and improvements on land administered by NPS); S. Rep. No. 765 ("Senate Report"), 89th Cong., 1st Sess. (1965) ("Section 2 emphasizes the importance of encouraging private concessioners to provide and operate such facilities as the Secretary of the Interior finds desirable for the accommodation of visitors to National Park Service areas and directs the Secretary to 'encourage and enable' such persons to do so."), *reprinted in* 1965 U.S.C.C.A.N. 3489, 3493.

We disagree with FST's characterization of the role of concessioner profits in the franchise fee determination. First, it is clear that the CPA permits the express consideration of profits. The CPA dictates that franchise fees should be based on the "probable value to the concessioner of the privileges granted by the particular contract or permit involved[,]" 16 U.S.C. § 20b(d), and defines the "probable value" as the "opportunity for *net profit* in relation to both gross receipts and capital invested." *Id.* (emphasis added). The CPA further mandates that the Secretary "exercise his authority in a manner consistent with a reasonable opportunity for the concessioner to realize *a profit* on his operation as a whole commensurate with the capital invested and the obligations assumed." *Id.* § 20b(b) (emphasis added). Thus, the CPA itself quite explicitly permits the calculation of a franchise fee in relation to the profits that can be expected by a concessioner.

Further, FST has failed to substantiate its contention that NPS-48 is designed to *limit* concessioners' profits. Contrary to FST's contention, profit limitation is not the goal of NPS-48; rather, the goal of NPS-48 is clearly to provide a framework for the reporting of financial data and for the determination of an appropriate franchise fee, and the profit of others in the industry is a valid factor for NPS to include as a consideration in the fee determination. In sum, the CPA gives NPS the authority to consider profits in calculating franchise fees, and NPS-48 provides an appropriate method under the CPA for weighing profits in its fee determination.

B. *Authority to Adjust Fees Unilaterally*

The contract between NPS and FST in the instant case details the procedure which a party must follow when seeking an adjustment of franchise fees. While the procedure involves the participation of both parties, in the end, it is NPS's final determination of the fee amount which governs. FST argues that although the CPA authorizes the unilateral *reconsideration* of fees by NPS, the statute does not allow NPS to *adjust* franchise fees absent agreement by both parties to the concession contract.

The CPA expressly provides for the reconsideration of a concessioner's fees: "Appropriate provisions shall be made for reconsideration of franchise fees at least every five years unless the contract is for a lesser period of time." 16 U.S.C. § 20b(d). The statute does not, however, state whether the provision for reconsideration of fees also applies to adjustment of fees. We therefore look beyond the language of the statute to determine whether NPS's interpretation of the statute, which would authorize NPS not only to reconsider, but also to adjust fees in the instant case, is a rational one. *See Adams v. Dole*, 927 F.2d 771, 774 (4th Cir.), *cert. denied*, 502 U.S. 837 (1991) (If the language of a statute is clear, a court must give effect to the intent of Congress as expressed in the statute; "[i]f the statute is ambiguous, however, the question then becomes one of whether the interpretation by the agency charged with its administration is a permissible one." (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984))).

H.R. 2091, the bill which ultimately became the CPA, provided that "[a]ppropriate provision *may* be made for periodic *reconsideration and adjustment* of franchise fees . . . ." H.R. 2091, 89th Cong., 1st Sess. (1965) (emphasis added). However, the bill as eventually passed stated that "[a]ppropriate provisions *shall* be made for *reconsideration* of franchise fees at least every five years . . . ." 16 U.S.C. § 20b(d) (emphasis added). Stewart L. Udall, then Secretary of the Interior, suggested the amendment to the bill, stating, "This amendment would bring the provisions of the bill generally in line with the executive branch policy for frequent review of fees charged." Senate Report, *reprinted in* 1965 U.S.C.C.A.N. 3489, 3498. FST claims that the sole amendment that was made to the H.R. 2091 fran-

chise fees provision before the bill was passed was the deletion of the word "adjustment," and that the amendment demonstrates Congress' intent to preclude NPS from adjusting franchise fees under the authority granted to NPS by the statute.

However, FST ignores another amendment that was made to the bill's language: the word "may" was changed to "shall." An equally plausible reason for the deletion of the word "adjustment" is that Congress chose to make reconsideration of franchise fees mandatory as opposed to permissive (and therefore substituted "shall" for "may"), but did not wish to require adjustment of fees every five years (therefore deleting "adjustment"). In other words, although NPS should reconsider fees every five years, the fees need not actually be changed that often. "Adjustment" was thus deleted when "shall" was added. The legislative history of the CPA simply makes clear that Congress placed primary importance on the frequent reconsideration of fees; it does not necessarily indicate that Congress intended to preclude NPS's adjustment of fees.

NPS's interpretation of the CPA franchise fees provision—that it provides for adjustment as well as reconsideration of fees—is a completely logical one, and should be upheld. *See Adams*, 927 F.2d at 774 (we uphold an agency's interpretation of a statute if it is a "permissible" one); *Lewis v. Babbitt*, 998 F.2d 880, 881 (10th Cir. 1993) ("We review an agency's interpretation of an ambiguous statute to determine whether it is 'rational and consistent with the statute.'" (quoting *Aulston v. United States*, 915 F.2d 584, 589 (10th Cir. 1990), *cert. denied*, 590 U.S. 916 (1991))); *see also Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989) (a court will not substitute its construction of a statute for a reasonable interpretation of the statute made by an agency (citing *Chevron*, 467 U.S. at 844)). In fact, NPS's interpretation is persuasive; a statutory provision calling for reconsideration of fees would be rendered meaningless if it did not include authority for the adjustment of fees as well. In addition, we do not find NPS's construction of the statute to contravene the CPA's purpose of encouraging the investment of private concessioners in the park system; a clause providing for periodic adjustment of fees, which might be raised or lowered, is not necessarily adverse to the interests of concessioners.

C. *Appropriate Provision for Reconsideration of Fees*

The CPA requires that "[a]ppropriate provisions" be made for the reconsideration of fees at least every five years. *See* 16 U.S.C. § 20b(d). FST contends that, even if the CPA provides statutory authority for NPS to adjust franchise fees, § 9(e) of FST's contract with NPS is not an "appropriate provision" for the reconsideration of fees as mandated by the CPA. Section 9(e) states in its entirety:

> Within sixty (60) days after the end of each 5-year period of this contract or as otherwise specified, at the instance of either party hereto, the amount and character of the franchise fees provided for in this section may be reconsidered. Such request shall be made in writing within 60 days after the end of the applicable contract year but cannot be made before the end of such year. In the event that the Secretary and the Concessioner cannot agree upon an adjustment of the franchise fees within 120 days from the date of the request for renegotiation as made by either party, the position of the Concessioner must be reduced to writing within 30 days therefrom and submitted to the Secretary for a determination of appropriate fees, consistent with the fair value of any assigned Government Improvements and the probable value to the Concessioner of the privileges granted by this contract based upon a reasonable opportunity for a profit in relation to both gross receipts and capital invested. If desired by the Concessioner, an advisory arbitration panel will be established (one member to be selected by the Secretary, one by the Concessioner, and the third by agreement of the original two) for the purpose of recommending to the Secretary appropriate franchise fees. The Secretary and the Concessioner shall share equally the expenses of such advisory arbitration. ***The written determination of the Secretary as to franchise fees shall be final and conclusive upon the parties hereto.*** Any new fees established will be retroactive to the commencement of the applicable period for which notice of reconsideration is given and be effective for the remaining term of the contract unless subsequent negotiations establish yet a different franchise rate. If new rates are greater than existing rates, the Concessioner will pay all

> back fees due with the next regular payment. If new rates are less than the existing rate, the Concessioner may withhold the difference between the two rates from future payments until he has recouped the overpayment. Any new franchise fees will be evidenced by an amendment to the contract unless based upon the written determination of the Secretary, in which event a copy of the determination will be attached hereto and become a part hereof as fully as if originally incorporated herein.

(emphasis added). FST objects to the contractual provision because it allows the Secretary to make a final decision concerning fees without FST's consent. FST claims that § 9(e) thereby gives NPS "an absolute right to *sabotage* the entire contract . . . ."

However, contrary to FST's assertions, the contract does not empower NPS to exercise unfettered discretion regarding a fee adjustment. The language of the contract authorizes NPS to change fees only by complying with significant procedural constraints and safeguards. The contractual provision does not allow the changing of fees based on mere speculation, but rather mandates that fees be changed only pursuant to "a determination of appropriate fees, consistent with . . . the probable value to the Concessioner of the privileges granted by this contract based upon a reasonable opportunity for a profit in relation to both gross receipts and capital invested." Section 9(e) further details a process by which each side can voice objections to fee modifications. In addition, the contract provides for advisory arbitration for the purpose of recommending appropriate fees, and NPS has devised a detailed method, embodied in NPS-48, by which to recalculate fees. Finally, under the APA, 5 U.S.C. §§ 701-706, the aggrieved concessioner may resort to the courts, where the Secretary's actions will be scrutinized to determine whether he acted arbitrarily or capriciously. *See id.* § 706. Thus, § 9(e) would not allow NPS to "sabotage" the contract, as FST fears.

Further, we reject FST's argument that § 9(e) of the contract violates the common law of contracts, because it allows for the modification of a contract term, *i.e.* the fee amount, without consideration from the party opposing the modification or a change in circumstances. A fee adjustment is not technically a modification of the con-

tract at issue; it is an action that takes place pursuant to the very terms of the contract itself, and is one that was contemplated by the parties at the time of signing the contract. Significantly, the contract does not allow random modification at the whim of NPS; as outlined above, the contract provides a check on random adjustment of fees by setting out a detailed process which must be followed before fees are changed. The contract is thus designed to force the party seeking adjustment of the fees to pursue negotiations with the other side, and to come to a fair and reasonable determination of the value of the concession.

In sum, § 9(e) is a completely appropriate contractual provision under the CPA in that it provides for modification of fees through a reasoned process, and does not vest in NPS unbridled authority; at the same time, § 9(e) guarantees that the parties will not reach a stalemate when a fee adjustment is sought. We affirm the district court's finding that NPS was acting within its statutory authority when it adjusted FST's franchise fee.

III. *Contractual Authority*

FST also presents a challenge to NPS's authority under the contract itself to increase the franchise fee. FST claims that the contract is ambiguous because two of its terms conflict, and that the contract should therefore be construed against NPS. The district court found that under a plain reading of the contract, there was no conflict between the two contractual provisions. We review *de novo* the district court's construction of the contract. *Nehi Bottling Co., Inc. v. All-American Bottling Corp.*, 8 F.3d 157, 162 (4th Cir. 1993).

Section 9(a) of the contract provides: "For the term of this contract, the Concessioner shall pay to the Secretary for the privileges granted herein as follows: . . . . a further sum equal to FOUR AND ONE-QUARTER PERCENT (4 1/4%) of the Concessioner's gross receipts, as herein defined, for the preceding year." FST contends that § 9(a), which provides for a 4.25% franchise fee to be paid for the term of the contract, is in conflict with § 9(e) of the contract, which provides for the reconsideration of the franchise fee during the contract term. FST urges this Court to construe the conflict against NPS, and to hold that NPS may not change the 4.25% franchise fee specified in § 9(a).

We agree with the district court, however, that the contract is not ambiguous, because, under a plain reading of the contract, the specific fee amount in § 9(a) is meant to be subject to reconsideration as provided in § 9(e). Further, even if an ambiguity exists, we are compelled to interpret it in NPS's favor in this case. As FST itself points out, the concession contract incorporated the CPA as the law which was in effect at the time of the making of the contract. *See Northern Pac. Ry. Co. v. Wall*, 241 U.S. 87, 91 (1916) ("[T]he laws in force at the time and place of the making of a contract and which affect its validity, performance and enforcement, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."). Here, the CPA mandates that a concession contract contain a provision for reconsideration of fees at least every five years, *see* 16 U.S.C. § 20b(d), and, as we found above, reconsideration may include adjustment. Thus, any ambiguity which might be gleaned from the contractual language must be resolved in favor of the validity of § 9(e) of the contract, which carries out the statutory mandate requiring periodic reconsideration of fees. If we were to construe the contract to give effect to § 9(a) but not to § 9(e), we would be ignoring a provision of the contract that is necessary for the contract's validity under the CPA.

In addition, our interpretation of the contract, which provides for a fee of 4.25% under § 9(a) until the fee is reconsidered and adjusted under § 9(e), allows us to give effect to the contract as a whole rather than only to a single provision. *See Bruce v. Lumbermens Mut. Casualty Co.*, 222 F.2d 642, 645 (4th Cir. 1955) (the general principles of contract interpretation "require that an interpretation which gives a reasonable effect to all the manifestations of intention in an agreement is preferred to an interpretation which leaves a part of such manifestations unreasonable or of no effect . . . ."). We affirm the district court's finding that NPS had the contractual authority to adjust FST's fees in the instant case.[1]

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[1]We find unpersuasive FST's additional argument that § 9(a) itself is ambiguous, because the provision does not state when the probable value of the contract to the concessioner should be assessed. It is clear from the language of the contract that the value of the contract must be determined at approximately the same time as the fee reassessment takes place, *i.e.* within the time period allowed by the contract for fee reconsideration.

IV. *Notice*

On June 20, 1991, seven days after the June 13, 1991 expiration of the first five-year period under the concession contract, NPS wrote to FST stating that "[t]his letter is to advise you that the National Park Service is considering a renegotiation of your franchise fee." The letter directed FST to a specific paragraph of NPS-48 as well as to § 9(e) of the contract between the parties. FST argues that NPS's letter did not constitute proper notice of reconsideration of fees under § 9(e) of the contract, because the letter was not a request for a change in the amount and character of the fees.

The contract provides:

> Within sixty (60) days after the end of each 5-year period of this contract or as otherwise specified, at the instance of either party hereto, the amount and character of the franchise fees provided for in this section may be reconsidered. Such request shall be made in writing within 60 days after the end of the applicable contract year but cannot be made before the end of such year.

The contractual provision specifies that notice of reconsideration, not notice of a change, must be given. Moreover, FST was given ample opportunity to object to the franchise fee determination, both at the time that it received the June 20 letter, and subsequent to NPS's determination that a 12% fee would be appropriate. The district court correctly found that the June 20 letter was sufficient to put FST on notice of NPS's intention to reconsider the franchise fee. Since the notice came within the 60-day period, it was timely. The notice was therefore unobjectionable.

V. *Method of Calculating Fees*

FST raises what it believes are three errors in NPS's calculation of the 12% franchise fee in the instant case.[2] We begin our discussion

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[2]NPS contends that FST should be precluded from challenging the method by which NPS calculated the fees, because FST did not raise the

of FST's challenge by reviewing the way in which NPS determined the fee adjustment. Concessioners are required by their concession contracts to submit to NPS annual financial statements that have been audited in accordance with generally accepted accounting principles. The financial reports submitted during the five most recent complete years for which reports were filed are then used by NPS as the basis for its fee determination. NPS calculates the concessioner's annual gross receipts and adjusted net income, and based on these numbers, determines a minimum and maximum franchise fee. The final franchise fee is a number between the minimum and maximum, arrived at "based on [a] comparison of the concessioner's returns with similar outside industry returns." NPS then calculates the concessioner's anticipated returns using the new franchise fee to determine the effect of the new franchise fee on the concessioner's returns. Finally, NPS looks for other facts that could have an impact on the fee, and "[a]ny known future significant changes that are unique to the concessioner's operating situation should be included in the final fee determination."

FST submitted the required financial reports to NPS in accordance with the mandates of its contract and NPS-48.[3] In making its calcula-

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issue before the agency prior to resorting to the courts. First, we note that there is no requirement of exhaustion of administrative remedies under the CPA. *See Darby v. Cisneros*, 113 S. Ct. 2539, 2548 (1993) (where agency action is final, there is no requirement of exhaustion of administrative remedies in a case brought under the APA, unless expressly required by statute or agency rule). In any event, FST notified NPS in a letter of March 24, 1992 that it objected to the increase of the franchise fee from 4.25% to 12%. FST also appended a copy of the petition that it planned to file in the district court, detailing the contested issues, to a letter that it sent to NPS on April 14, 1993. NPS responded on June 16, 1993 that it had "carefully reviewed [FST's] objections to our financial analysis." We find that FST sufficiently raised its objections to the fee determination before NPS.

[3]FST argues that because NPS-48 was developed after FST entered into a contract with NPS, the guideline cannot be applied to the agreement of the parties in the instant case. However, NPS is not a law or regulation, but rather is only a guideline for use by NPS in making calculations. We find no problem with the application of NPS-48 to the agreement at hand.

tions based on FST's financial data from 1986 through 1990, NPS made two major adjustments to the information before it. The first adjustment concerned the "Spirit of Charleston," a boat used by FST to provide ferry service to the Monument.[4] NPS noted that the boat was also used by FST for charter and dinner cruise operations that were unrelated to its concession business ("outside operations"). Therefore, NPS found it necessary to prorate the operating, administrative, and fixed expenses of FST related to this boat in order to isolate the financial results of FST's concession operations. FST itself made most of the proration adjustments for the Spirit of Charleston's outside operations in its financial statements, and NPS used the prorated figures submitted by FST for its preliminary analysis.

NPS, however, made an additional finding as to the Spirit of Charleston. Rather than buying the boat, the concession leased it from a limited partnership, in which FST itself was the general partner. NPS concluded that "[t]he lease is not an arms length transaction and has resulted in lower earnings than would have occurred under an outright purchase of the boat." It therefore eliminated from its calculations consideration of the lease payments made by FST for the boat, and substituted a capital expenditure of $1 million in 1986 with a depreciation over 18 years, which was the estimated life of the boat. NPS assumed that FST had undertaken a debt of $600,000 in order to finance the purchase, with interest in the amount of $48,000 for a 10-year loan at 10%.

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[4]The story behind FST's acquisition of this particular boat sheds light on the basis of the dispute in the instant case. In 1986, NPS decided that public boat transportation to the Monument should be expanded, which would require additional docking facilities and a larger vessel. In order to encourage FST to assume the added risk of investment in these facilities, the parties cancelled their existing contract (which was to run only two more years) and agreed on a new contract (the one at issue in the instant case) with a fifteen-year term. FST subsequently acquired a new vessel and established a new docking facility. According to the district court's findings, the new vessel, the Spirit of Charleston, cost FST approximately $1.4 million. The new docking facility was constructed at a cost to FST of $154,000.

NPS's second adjustment to FST's financial data was made pursuant to NPS's finding that the amount of FST's officers' salaries (85% of which was attributed to the concession operation) had an adverse impact on FST's profitability. As an example, NPS pointed out that the president of FST was earning a yearly salary of approximately $200,000, although his daily activity with the concession operation was limited. In performing calculations, NPS thus chose to limit officers' salaries to 10% of FST's gross receipts, which was approximately the median in the water transportation industry according to a report published by Robert Morris Associates, 1990 Annual Statement Studies ("Morris Studies"). NPS thus reduced officers' salaries in its calculation from $304,419 to $162,742.

After making adjustments and performing the requisite calculations in order to ascertain a minimum and maximum franchise fee, and arriving at an estimated fee of 12%, NPS calculated the effect of a 12% franchise fee on FST's adjusted returns. Finally, NPS compared the FST data to the Dun & Bradstreet ("D&B") Industry Norms for the water transportation industry. NPS settled on the 12% franchise fee, which it believed would allow FST to reap profits in excess of D&B's median returns for the industry.

FST argues that there were three flaws in NPS's calculation of the franchise fee. First, FST argues that NPS's decision to ignore the terms of FST's leasing arrangement for the Spirit of Charleston was irrational and unsupported by relevant data. FST also contests NPS's adjustment to the salaries of its officers, claiming that NPS's use of the Morris Studies to tailor the salaries is rational only if those studies accurately represent the industry of which FST is a part. Finally, FST argues that NPS provided no basis upon which to conclude that D&B's water transportation industry statistics are reflective of an industry that can logically be compared to FST's, because FST's situation differs from that of others in the water transportation industry due to rigid controls imposed by NPS on FST's business. FST additionally points out that even if the Morris and D&B publications contain data on industries comparable to FST's, the reports themselves may be incomplete or inaccurate.

When reviewing informal agency action under the APA, a court must "hold unlawful and set aside agency action, findings, and con-

clusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706. Although the arbitrary and capricious standard provides only for limited review, *National Treasury Employees Union v. Horner*, 854 F.2d 490, 498 (D.C. Cir. 1988),

> [a] reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."

Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). It is the court's task to review the considerations on which the agency relied, and to check that the agency's decision has "some basis in the record." *Horner*, 854 F.2d at 498.

First, we find no error in NPS's decision regarding FST's leasing arrangements for the Spirit of Charleston. We require the Secretary to articulate a rational connection between the evidence and his exercise of discretion. *See Virginia Agric. Growers Ass'n, Inc. v. Donovan*, 774 F.2d 89, 93 (4th Cir. 1985). The administrative record clearly lays out the factors upon which NPS relied in adjusting FST's financial data concerning the Spirit of Charleston. NPS stated that it made its calculations based on a sale rather than a lease arrangement because it believed that the nature of the leasing transaction had lowered FST's earnings, and offered the exact figures used to calculate what the cost of the boat would have been if the boat had been purchased outright. NPS's determination is clearly supported by the facts in the record, and was not arbitrary or capricious.

FST's two remaining challenges to NPS's fee calculation—that NPS erred in adjusting FST's officers' salaries and in comparing FST's financial data to the D&B Industry Norms—we consider together. FST first claims that it was denied an opportunity to show that both the officers' salaries and the industry standards used by NPS for comparison were inaccurate, because it was not provided with

copies of the Morris Studies and D&B Norms. The studies themselves were not included in the administrative record, and the district court granted NPS's motion for a protective order, although FST had hoped to obtain the financial reports through discovery and to depose certain NPS employees who were involved in the fee determination.[6] FST claims that the district court's grant of the protective order constituted an abuse of discretion.

Judicial review of administrative action is generally confined to the administrative record. *See Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021, 1024 (4th Cir.) (in reviewing agency action under the APA, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam))), *cert. denied*, 423 U.S. 912 (1975); *Lewis*, 998 F.2d at 882 ("Judicial review under these standards is generally based on the administrative record that was before the agency at the time of its decision . . . ." (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 738 (10th Cir. 1993))). However, although review is based on a limited record, "there may be circumstances to justify expanding the record or permitting discovery." *Public Power Council v. Johnson*, 674 F.2d 791, 793 (9th Cir. 1982). We find that the district court did not abuse its discretion in finding that such circumstances did not exist in the instant case.

While it is the duty of an agency "to establish the statistical validity of the evidence before it prior to reaching conclusions based on that evidence," *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1467 n.5 (7th Cir.), *cert. denied*, 474 U.S. 902 (1985), it is FST's burden to show that NPS's action was arbitrary and capricious, *see San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Comm'n*, 789 F.2d 26, 37 (D.C. Cir.) (party claiming that an agency's action was arbitrary and capricious bears the burden of proof), *cert. denied*, 479 U.S. 923 (1986). NPS contends, and FST does not dispute, that both the Morris Studies and the D&B Norms are copyrighted publications

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[6]FST also sought to obtain the relevant reports before trial, through a FOIA request. FST was not provided with the information because "[t]hese documents are copyrighted public information that can be obtained directly from either [publishing] organization itself."

that are available from the organizations which issue them. In addition, NPS-48, included in the administrative record, contains a "Bibliography of Industry Statistics Available for Use in the National Park Service Franchise Fee Determination," which lists the names of both publications challenged by FST, and the names of the organizations which publish them. FST cannot claim that it was unaware of which reports were relevant to the franchise fee determination in the instant case, since FST listed the exact reports in which it was interested in the revised FOIA request that it submitted to NPS on May 12, 1992. It was FST's burden to procure the Morris Studies and the D&B Norms and to attempt to supplement the administrative record, or to show why it could not obtain the reports. It was not an abuse of discretion for the district court to deny discovery which was intended to shift the burden of producing the reports onto NPS.[6]

Next, FST mounts a challenge to the Morris Studies and the D&B publications themselves, claiming both that the reports provide data on companies that are not comparable to FST, and that the data contained in the reports are not accurate. An agency's use of a study that is designed for a purpose other than that for which it is used by the agency, and "which is limited and criticized by its authors on points essential to the use sought to be made of it," may be considered arbitrary and capricious action. *See Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579, 1583 (10th Cir.), *cert. denied*, 474 U.S. 863 (1985). FST has not, however, pointed to any evidence in the record tending to prove that NPS's reliance on the studies in question constituted arbitrary and capricious action. In ruling in favor of NPS on FST's challenge to NPS's calculations, the district court stated that

> adjustments and the use of industry averages are a rational method for the government to measure profits and avoid the

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[6]We note, as well, that it is unlikely that, had FST obtained the reports from the relevant organizations, NPS would have objected to the inclusion of the reports in the record before the court, since statistics from some older versions of the D&B Norms had already been included in the administrative record as part of NPS-48. In fact, a stipulation filed with the district court on October 20, 1993 reflects that FST had supplemented the administrative record before the court on at least one occasion, with NPS's consent.

> injustice of according lower franchise fees to concessioners with accounting methods which disguise profits . . . . [T]his court . . . finds that the procedures employed by the government analysts were rational and neither arbitrary nor capricious. It is not irrational for the NPS to utilize industry expense and profit averages as the basis to assess an individual concessioner's reasonable opportunity to make a profit.

We agree with the district court that the use of such studies by NPS in determining franchise fees is entirely appropriate. In addition, NPS-48 reflects that NPS employees are directed to use industry norms carefully when making franchise fee determinations. While FST makes bald assertions as to the inaccuracy of the reports, it has shown neither that the industries studied in the reports were not comparable to FST's, nor that the reports themselves are inaccurate. We therefore affirm the district court's finding that NPS's use of the two publications did not constitute arbitrary or capricious action.

It was FST's burden to provide the court with evidence that NPS's actions were arbitrary or capricious. FST has produced no such evidence. We therefore affirm both the district court's finding that NPS's decision to raise FST's franchise fee to 12% was neither arbitrary nor capricious, and the district court's grant of a protective order to NPS.

VI. *Conclusion*

We find that NPS had both the statutory and the contractual authority to raise FST's franchise fee in the instant case. Further, the notice provided to FST and the fee determination itself were unobjectionable. The decision of the district court is therefore

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: November 27, 1995

No. 94-1570
CA-93-918-21AJ

FORT SUMTER TOURS, INCORPORATED
Petitioner - Appellant

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR
Respondent - Appellee

NATIONAL PARK HOSPITALITY ASSOCIATION
Amicus Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Bert M. Montague, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FORT SUMTER TOURS, INC. Petitioner, -v- BRUCE BABBITT, SECRETARY, DEPARTMENT OF THE INTERIOR, an agency of the federal government, Respondent.	)	CIVIL ACTION # 2:93-0918-1AJ **ORDER**

This action is before the court upon the petition of Fort Sumter Tours, Inc. for the interpretation of its concession contract with the respondent. Upon agreement of the parties, this non-jury action was presented in the format of an appellate argument, and both parties have fully briefed the issues. Oral arguments were presented to this court on January 5, 1994.

FACTS

Under the Concessions Policy Act ("CPA"), 16 U.S.C. §§ 20 through 20g, the Secretary of the Interior is responsible for the oversight of national parks and monuments such as Fort Sumter National Monument, and the National Park Service is tasked with carrying out the operation of

these parks and monuments. Fort Sumter Tours, Inc. ("FST" or "concessioner") has provided public transportation to the Fort Sumter National Monument under contract with the National Park Service ("NPS" or "government") for the past 32 years. As part of its agreement with the NPS, the concessioner FST has made significant capital expenditures in order to carry out its duties of transporting tourists to Fort Sumter. These capital expenditures included the acquisition of an additional vessel, the "Spirit of Charleston," for which FST paid $1.4 million, and the construction of an additional docking facility at Patriot's Point for $154,000. These two particular items were acquired when NPS decided to offer tours from Patriot's Point in addition to those originating from the City Marina. FST negotiated the current contract with NPS when this additional route was proposed.

This current contract between the parties was executed on June 13, 1986 and is in effect through December 31, 2000. This contract necessarily covers an extended time period in order to facilitate the financing of the above noted capital expenditures by the concessioner. The portion of this contract at issue is section 9(e), which provides that while the franchise fee was set at 4.25% of FST's annual gross receipts, at five-year intervals during the term of the contract, the franchise fee percentage may be reconsidered. From 1986 to 1991 that percentage was 4.25%, and the NPS determined that the fee should be increased to 12% for the period June 1991 to June 1996. To illustrate the significance of this change, FST points out that in 1992 the franchise fee at 4.25% totaled $82,222. The fee for that same year at the proposed rate of 12% amounts to $229,531.44.

The concession contract provides that NPS must indicate its intent to reconsider the franchise fee within 60 days after the expiration of each five-year period in the term of the contract. NPS sent a letter to FST indicating its

intention to "renegotiate" the franchise fee on June 20, 1991, eight days after expiration of the first five-year period. See Administrative Record at Tab C. On March 16, 1992, NPS informed FST of the proposed fee increase to 12%. Id. at Tab H. FST asserted its objection to the proposed increase by letter to NPS on March 24, 1992. Id. at Tab I. In a letter dated May 15, 1992, NPS acknowledged FST's objection, and stated that "[t]he conclusion [from their analysis] is that the fair value of the privileges granted by the contract is, in fact, 12 percent of the annual gross receipts. Unless you can substantiate your belief that the current value of these privileges is, in fact, 4.25 percent of the gross revenues, we cannot accept your conclusions." Id. at Tab M. On April 14, 1993, FST stated in a letter to NPS that "we believe it is in our mutual interest to seek a declaration of rights by the courts on this critical issue. Such a declaration will provide all interests with certainty of their rights and duties regarding the renegotiation of franchise fees at this point and in the future." Id. at Tab S. In its letter dated April 15, 1993, NPS outlined the objection procedure for FST to follow according to section 9(e) of the concession contract: "[P]lease state to us in writing your objections to this proposed fee. Please include in your response your preferred method of resolving our dispute . . . . [Y]ou can either request the Secretary . . . . to determine the appropriate fee, or you can request the establishment of an arbitration panel to recommend to the Secretary an appropriate fee." Administrative Record at Tab T. Instead of following this procedure, FST chose to file a declaratory judgment action in this court on April 21, 1993. By letter dated June 16, 1993, NPS noted that FST bypassed the advisory arbitration process, and stated that its final decision was to increase the fee to 12%. Id. at Tab V.

FST's argument is essentially three-prong: First, that

NPS had no statutory authority under the CPA to adjust the franchise fee percentage through section 9(e) of the contract. Next, FST argues that if NPS did have that authority under the CPA, section 9(e) of the contract cannot be enforced because it conflicts with section 9(a) of the contract. Third, FST contends that even if the NPS had authority and section 9(e) of the contract is valid, the government failed to justify the increase by substantial evidence regarding the profits earned by FST. In its petition, FST seeks an order by this court declaring that neither the CPA nor the contract authorize the NPS to increase the franchise fee as proposed. In the alternative, FST seeks a declaration that FST [sic] waived its right to reconsider the franchise fee by failing to satisfy the notice requirement as stated in the contract.

NPS counters that under both the concession contract and the CPA it has discretion reevaluate the franchise fee percentage every five years. Further, it contends that the plain language of the contract does not require a change in the scope of the contract in order for the Secretary of the Interior to establish a new percentage. Additionally, NPS points out that if the concessioner disagrees with the Secretary's determination of the fee, there are appellate remedies under the Administrative Procedure Act ("APA"), with reversal for arbitrary and capricious acts by the Secretary.

DISCUSSION

This court has jurisdiction over this petition under the APA by virtue of the fact that FST does not seek money damages in its petition. 5 U.S.C. § 702 ("An action in a court of the United States seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States"). See Hamilton Stores, Inc. v. Hodel, 925 F.2d 1272, 1278

n.12 (10th Cir. 1991). "The claim of violation of plaintiff [FST's] rights under the statute and regulations, and the parallel contract provisions, comes within federal question jurisdiction of the district court under 28 U.S.C. § 1331 for review of the challenged agency action." Id. at 1279 (citing Bell v. New Jersey, 461 U.S. 773, 777-78 n.3, 103 S. Ct. 2187, 2190 n.3 (1983)). "There is appropriate federal question jurisdiction under § 1331 to adjudicate the plaintiff's federal claims here of violation by the defendants of the Concessions Policy Act of 1965, 16 U.S.C. § 20 et seq; regulations promulgated under that Act, 36 C.F.R. §§ 51.1-51.7 (1989); and the plaintiff's claim premised on its contract with NPC [sic], a federal agency--a federal question itself Hamilton Stores, 925 F.2d at 1279 (citing United States v. Allegheny County, 322 U.S. 174, 183, 64 S. Ct. 908, 913 (1944)).

The decision of the Secretary of the Interior to increase the franchise fee imposed upon FST became a "final agency action" under section 10(c) of the APA, 5 U.S.C. § 704, when NPS sent a letter indicating its final decision to FST on June 16, 1993. See Fort Sumter Tours, Inc. v. Andrus 564 F.2d 1119, 1123 (4th Cir. 1977) (affirming an injunction which FST sought against the Secretary of the Interior for failure to accord FST the full measure of its statutory right to renew an earlier concession contract).

Regarding the procedural posture of this action, it was originally filed as a declaratory judgment action, and is now before this court as an administrative appeal of the Secretary of the Interior's final agency action to raise the franchise fee. The declaratory judgment action was filed on April 21, 1993, prior to the time that the decision became a final agency action by letter dated June 16, 1993. Appeals of agency decisions may be heard only after they become final agency actions. 5 U.S.C. § 704.

Because of the procedural posture of this action, this court must ensure that the petitioner was not deprived of its opportunity to present an alternative proposal to the analysis which led NPS to increase the franchise fee. It is of paramount importance that litigants have a full and fair opportunity to present their arguments prior to the final agency action. In the present case, however, FST had sufficient notice and opportunity to rebut the financial analysis employed by NPS before the increased franchise fee became a final agency action. FST chose to challenge the action of NPS from the standpoint of statutory and contractual authority. This court will thus review the authority of the Secretary of the Interior and NPS under the CPA and the concession contract. If such authority exists to increase the franchise fee, this court shall then proceed to review the agency's decision under the "arbitrary and capricious" standard of review. Under such a review, this court is bound by the Administrative Record which reflects the information available to the respondents at the time of the final agency action.

This court must ascertain whether the Secretary's decision constituted an abuse of the discretion which he was authorized under the CPA and under the concession contract. The review of this final agency action is to be conducted in accordance with APA § 10(c):

> The actions of the Secretary of the Interior and his delegates are reviewed in accordance with the Administrative Procedure Act, 5 U.S.C. § 706. Administrative decisions must be upheld unless 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A). The scope of judicial review under this standard is narrow, and the Court is not permitted to substitute its

> own judgment for that of the administrative decision-maker. The relevant inquiry is whether the agency '"considered the relevant factors and articulated a rational connection between the facts found and the choice made."'

Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 624 (W.D. Wash. 1991) (case citations omitted).

I. STATUTORY AUTHORITY

"This court must inquire whether the Secretary and his delegates have properly discharged their duties under the [Concessions Policy Act] and appropriate administrative regulations." Id. The relevant internal policy provisions in the present case are the Concessions Management Guidelines, known as "NPS-48," which set forth the procedures for the NPS to analyze the profits made by concessioners such as FST. This analysis then serves as the basis for any adjustment of the franchise fee at five-year intervals during the term of the contract at issue. The Concessions Policy Act, 16 U.S.C. §§ 20 through 20g ("CPA"), provides:

> (b) The Secretary shall exercise his authority in a manner consistent with a reasonable opportunity for the concessioner to realize a profit on his operation as a whole commensurate with the capital invested and the obligations assumed.
>
> . . .
>
> (d) Franchise fees, however stated, shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular contract or permit involved. Such value is the opportunity for

> net profit in relation to both gross receipts and capital invested. Consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates. Appropriate provisions shall be made for reconsideration of franchise fees at least every five years unless the contract is for a lesser period of time.

16 U.S.C. § 20b(b) and (d).

In its first argument FST claims that under the current contract and the CPA, the NPS only has authority to impose such an increase upon agreement of the parties or a change in the scope of the contract privileges or obligations. FST contends that under 16 U.S.C. § 20b(d) noted above, the "probable value to the concessioner of the privileges granted by the particular contract or permit involved" would only change if there was a change in the scope of the contract. FST states that an example of such a change would be if NPS suddenly informed FST that it would be required to provide boat transportation for tours to nearby Fort Moultrie in addition to the tours to Fort Sumter. Such a change might require FST to obtain an additional vessel, and make other capital expenditures similar to the construction of the landing dock at Patriot's Point. That change would have a substantial impact on FST's profitability, and a franchise fee adjustment would likely be appropriate. Under the present facts, FST maintains that because it neither agreed to the 12% fee nor had a change in the scope of its concession contract, NPS cannot carry out this franchise fee adjustment.

This court's attention is drawn to 16 U.S.C. § 20b(d), quoted in the above discussion, which states that

"consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates." Thus, while revenue to the government is "subordinate to the primary objectives" of the CPA, this provision provides authority for the Secretary of the Interior to at least consider its own operating expenses and revenue requirements when it considers the adjustment of franchise fees to be paid by its concessioners. This section provides an indication that this subsection was not enacted solely for the benefit of the concessioner. The franchise fee may be increased or decreased, so long as the concessioners are given a reasonable opportunity to make a profit and the monuments and parks are well preserved and open to the public. FST argues that there must be a change in the scope of the contract before the Secretary of the Interior may raise the franchise fee. This argument presumes that there is no other basis upon which the fee may be increased. The statute merely provides that the franchise fee may be adjusted so long as NPS ensures that "the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates" are not overshadowed by efforts to increase its own revenues. If such an increase in franchise fee revenues is necessary to cover operating expenses of parks and monuments, for example, the primary and subordinate objectives of the CPA will not be in conflict.

FST contends that the main goal of the CPA was to promote the efficient operation of national parks and monuments by encouraging private investment by concessioners. Further, FST argues that allowing the NPS to drastically reduce the profitability of the concessioner by increasing franchise fees while a contract is in effect would directly conflict with the goal of encouraging long-term

capital financing by concessioners. Without this stability over the life of a concession contract, the concessioners will experience great difficulty in obtaining loans for these capital investments.

This argument has strong policy appeal, but this court finds that under the CPA and the concession contract, the Secretary of the Interior has discretion to adjust the level of the franchise fee set forth in the concession contract, so long as the concessioner is afforded a reasonable opportunity to make a profit. As noted above, "[t]he scope of judicial review under this standard is narrow, and the Court is not permitted to substitute its own judgment for that of the administrative decision-maker." Northern Spotted Owl v. Lujan, supra, 758 F. Supp. at 624.

FST specifically objected to the procedure the NPS employed to determine the proper percentage of the franchise fee. The NPS-48 guidelines rely on statistics to determine fees based upon "average profitability" in the concession industry. FST argues that calculation of fees in this way violates the CPA, and that by applying this regulation, NPS is illegally attempting to control FST's profitability. It is undisputed that in order to reassess the percentage of the franchise fee, financial analysts for the NPS made certain adjustments to the financial records of FST to determine FST's annual profits. It appears that there were two expense items of special concern to the analysts: the salaries paid to officers, and the method in which FST listed its expenses for a tour boat "Spirit of Charleston." The government explains that officers' salaries are routinely subjected to a higher level of scrutiny than other expenses because high salary expenses could be employed to disguise the amount of profits made by concessioners. Additionally, the government analysts determined that profits could be more accurately ascertained by a straight purchase and installment expense method rather

than the method employed by FST, which involved a lease agreement with a limited partnership.

The government contends that FST did not properly preserve this issue for consideration by this court. It contends that while FST may have objected to the fee increase when it was proposed by NPS, FST did not provide an alternative analysis for the Secretary of the Interior to consider prior to making his final determination. Without this alternative analysis, the government argues that the financial analysis performed by NPS must be accepted by this court as a factual matter. FST contends that it was not required to offer an alternate analysis in order to preserve its objection to the resulting increase in franchise fees.

In its review of this decision, this court is bound to consider only the administrative record, which consists of the information available to the decisionmaker at the time of the final agency action. According to Burlington Truck Lines v. United States, 371 U.S. 156, 168-69, 83 S. Ct. 239, 246 (1962), "[t]he courts may not accept appellate counsels post hoc rationalizations for agency action; . . . an agency's discretionary order [may only] be upheld, if at all, on the same basis articulated in the order by the agency itself . . . ." For this reason, this court cannot consider any alternative analyses unless they were brought before the decisionmaker at the time of the final agency action. This same reasoning was applied in an earlier order in this action, filed September 3, 1993, in which this court granted the government's protective order against discovery.

The relevant inquiry in the analysis of the final agency action is whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." Northern Spotted Owl v. Lujan, supra, 758 F. Supp. at 624. Thus, in the instant case, the inquiry is whether the procedure outlined in NPS-48 appears

to be a rational method of determining profit levels for the purpose of franchise fee assessment. "The scope of judicial review under this standard is narrow, and the Court is not permitted to substitute its own judgment for that of the administrative decision-maker." Id.

Under this standard of review, this court finds that the procedure followed by the NPS under NPS-48 is neither arbitrary nor capricious, and that it is a rational method to determine the actual profits made by FST. As NPS pointed out, to evaluate the proper level of the franchise fee, certain expense items on the financial records of concessioners are adjusted by financial analysts to account for potential manipulation of the profit levels. Further, in its analysis of the concessioner's profitability, the NPS utilizes information on profits from statistical averages within the industry. The statistical average profit margin within the concessions industry is not necessarily a truly accurate representation of the annual profits made by individual concessioners. Each year individual concessioners encounter a variety of factors which may have a dramatic effect on their annual profits. However, this court finds that such adjustments and the use of industry averages are a rational method for the government to measure profits and avoid the injustice of according lower franchise fees to concessioners with accounting methods which disguise profits. The propriety of FST's accounting for expenses and profits is not at issue here. Rather, this court merely finds that the procedures employed by the government analysts were rational and neither arbitrary nor capricious. It is not irrational for the NPS to utilize industry expense and profit averages as the basis to assess an individual concessioner's reasonable opportunity to make a profit. FST argues that because the NPS-48 method determines the proper franchise fee percentage depending upon the relationship of the concessioner's profit to the

average profit in the industry, this method acts as a disincentive for concessioners to operate in a profitable manner. However, the requirement of the NPS is to afford concessioners a reasonable opportunity to make a profit, while ensuring that the national monuments are operational and well maintained. It is neither irrational nor unreasonable for the NPS to review industry data in order to determine franchise fees which "shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular contract or permit involved." 16 U.S.C. § 20b(d). The Secretary of the Interior did not abuse his discretion by determining that a 12% franchise fee struck the proper balance between FST's opportunity to earn a reasonable profit and the subordinate consideration of revenue to maintain the monument.

II. THE CONCESSION CONTRACT

The second argument set forth by FST is that section 9(e) of the concession contract is unenforceable because it directly conflicts with section 9(a), and that NPS cannot modify the contract by raising the franchise fee without supporting that modification with additional consideration to FST.

According to FST, section 9(e) of the contract which provides for reconsideration of the franchise fee at five-year intervals, is in direct conflict with section 9(a)(2) of the contract, which provides that the franchise fee is 4.25% for the 15 year term of the contract. FST concludes that these two sections can operate together only if this court finds that a change in the franchise fee must be accompanied by a change in the rights and obligations under the contract.

As petitioner set forth in its Amended Brief at p. 10, according to section 9(e) of the concession contract, "[t]he Secretary [shall determine] appropriate fees consistent with .

. . the probable value to the concessioner of the privileges granted by the contract based on a reasonable opportunity for a profit in relation to both gross receipts and capital invested. . . ." Further, "[t]he written determination of the Secretary as to franchise fees shall be final and conclusive upon the parties hereto."

As stated by then-District Judge Russell, "[i]t is the duty of Courts, not to write contracts, but to enforce them, giving their language its 'plain, ordinary, and popular sense.'" Heaton v. State Farm Mutual Automobile Ins. Co., 278 F. Supp. 725, 727 (D.S.C.) aff'd, 398 F.2d 824 (4th Cir. 1968). This court finds that NPS had contractual authority to reconsider and adjust the franchise fee to be paid by FST. In a plain reading of the concession contract, section 9(e) is an adequate expression of the parties' intent to make the franchise fee of subsection 9(a) subject to reconsideration.

Regarding the lack of additional consideration by NPS in support of the change in the franchise fee, the government points to the Uniform Commercial Code provisions on sales of goods, arguing that when a contract term is left to be specified in the future, the resulting term shall be in good faith and commercially reasonable. U.C.C. §§ 2-305(2); 2-311(1) See also James J. White and Robert S. Summers, Uniform Commercial Code §§ 3-5 & 3-7 (3d ed. 1988). It does appear that the Secretary of the Interior's discretion to determine the franchise fee over the objection of the concessioner is contrary to a traditional formulation of a contract as an "exchange of risks." Id. However, this contract is not one for the sale of goods. Thus, while this analogy to a sale of goods contract is persuasive, references to Article 2 of the Uniform Commercial Code are generally inapplicable.

It appears that the parties to the present concession

contract agreed to leave the franchise fee open to reconsideration in order to allow either party to escape from what it felt to be an unreasonable franchise fee. The concession contract in the instant case clearly states that NPS must afford the concessioner a reasonable opportunity to make a profit, and that the franchise fee is to be based upon the probable value of the concession to FST. It further appears to this court that the NPS-48 procedures employed by the Secretary of the Interior in adjusting the franchise fee were neither arbitrary nor capricious, and were performed in accordance with the contract section 9(e). The contract does not provide a guaranteed minimum profit for the concessioner, nor does it set a limit on maximum profits from the concession. So long as NPS does not apply an arbitrary or capricious analysis when it determines that the concessioner has a reasonable opportunity to make a profit, NPS has upheld its part of the agreement. The contract contains no discussion of additional consideration or changing the franchise fee only upon a change in the scope of duties of either party.

Plaintiffs point to City of Spartanburg v. Spartan Villa, 253 S.E.2d 501 (S.C. 1978) for the proposition that the government cannot increase fees unilaterally after those fees were set in contract, unless the obligation for additional fees was supported by some new consideration. This case is distinguishable from the case at bar, however, because in Spartan Villa, the city agreed in contract to a set fee that must be paid for water service; the city subsequently enacted an ordinance which raised this fee. There was no provision in the contract for a periodic review or adjustment of the fee as there is in the present case. As the court stated, "[t]here was no reservation that the [sewer] tap was temporary or that the fee was only partial payment." Id. at 502. Spartan Villas later received a letter from the city indicating that the

permission to use the sewer service was only temporary. The court found that the parties had agreed prior to that letter that the permission was not temporary, and that the city must furnish sewer service for the Original amount paid by Spartan Villas.

It is beyond dispute that "past consideration is no consideration." Richard A. Lord, 4 Williston on Contracts § 8:9 at 207-09 (4th ed. 1992). The original contract in Spartan Villa did not express an intention or expectation that the fee would be subject to modification within the term of the contract. For that reason, a unilateral increase in fees without a prior agreement as to fee reconsideration was improper in that case. In the present case, however, the unambiguous language of the contract sets forth procedures for periodic reconsideration and possible adjustment of the franchise fee.

III. NOTICE

NPS sent a letter to FST on June 20, 1991, eight days after the end of the first five-year period of the contract, which advised that NPS was considering a "renegotiation" of the franchise fee. See Administrative Record at Tab C. Later, on March 16, 1992, NPS sent another letter to FST indicating that their analysis resulted in a proposed franchise fee of 12%. Id. at Tab H. This court finds that the letter of June 20, 1991 was sufficient to put FST on notice of the action by NPS, and that FST was thereby afforded adequate time to respond and otherwise defend against the proposed reconsideration of the franchise fee.

CONCLUSION

Fort Sumter Tours, Inc. entered into the present concession contract with the understanding that while its concession activity is to be strictly regulated by the National

Park Service, they would nonetheless be given a reasonable opportunity to make a profit on concession activity. The contract clearly states that at five-year intervals during the term of the contract, the amount of the franchise fee is subject to reconsideration. So long as NPS continues to provide a reasonable opportunity for FST to earn a profit, there is sufficient consideration to allow NPS to reconsider the amount of the franchise fee. The procedures that NPS followed in this reconsideration were neither arbitrary nor capricious, and the resulting franchise fee is not so excessive as to preclude a reasonable opportunity for FST to earn a profit from its concession. For the foregoing reasons, it is

ORDERED, that the petition filed on November 15, 1993, in which Fort Sumter Tours, Inc. seeks an interpretation of this concession contract that would disallow the National Park Service's increase of the franchise fee to 12%, be, and it is hereby, denied. The Secretary of the Interior's final agency action which increased the franchise fee is hereby affirmed.

IT IS SO ORDERED.

_____

Falcon B. Hawkins,
United States District Judge
Charleston, S.C.

February 3, 1994

UNITED STATES CODE
TITLE 16. CONSERVATION
CHAPTER 1--NATIONAL PARKS, MILITARY PARKS, MONUMENTS, AND SEASHORES
SUBCHAPTER IV--CONCESSIONS FOR ACCOMMODATIONS, FACILITIES, AND SERVICES IN AREAS ADMINISTERED BY NATIONAL PARK SERVICE

§ 20. Congressional findings and statement of purpose

In furtherance of sections 1 and 2 to 4 of this title, as amended, which direct the Secretary of the Interior to administer national park system areas in accordance with the fundamental purpose of conserving their scenery, wildlife, natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations, the Congress hereby finds that the preservation of park values requires that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair these values and so that development of such facilities can best be limited to locations where the least damage to park values will be caused. It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas.

§ 20a. Authority of Secretary of the Interior to encourage concessioners

Subject to the findings and policy stated in section 20 of this title, the Secretary of the Interior shall take such action as may be appropriate to encourage and enable private persons and corporations (hereinafter referred to as "concessioners") to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the National Park Service.

§ 20b. Protection of concessioner's investment

(a) Contract terms; compensation for loss of investment

Without limitation of the foregoing, the Secretary may include in contracts for the providing of facilities and services such terms and conditions as, in his judgment, are required to assure the concessioner of adequate protection against loss of investment in structures, fixtures, improvements, equipment, supplies, and other tangible property provided by him for the purposes of the contract (but not against loss of anticipated profits) resulting from discretionary acts, policies, or decisions of the Secretary occurring after the contract has become effective under which acts, policies, or decisions the concessioner's authority to conduct some or all of his authorized operations under the contract ceases or his structures, fixtures, and improvements, or any of them, are required to be transferred to another party or to be abandoned, removed, or demolished. Such terms and conditions may include an obligation of the United States to compensate the concessioner for loss of investment, as

aforesaid.

(b) Profit commensurate with capital invested and obligations assumed

The Secretary shall exercise his authority in a manner consistent with a reasonable opportunity for the concessioner to realize a profit on his operation as a whole commensurate with the capital invested and the obligations assumed.

(c) Reasonableness of concessioner's rates and charges

The reasonableness of a concessioner's rates and charges to the public shall, unless otherwise provided in the contract, be judged primarily by comparison with those current for facilities and services of comparable character under similar conditions, with due consideration for length of season, provision for peakloads, average percentage of occupancy, accessibility, availability and costs of labor and materials, type of patronage, and other factors deemed significant by the Secretary.

(d) Determination of franchise fees; reconsideration every five years or oftener

Franchise fees, however stated, shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular contract or permit involved. Such value is the opportunity for net profit in relation to both gross receipts and capital invested. Consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates. Appropriate provisions shall be

made for reconsideration of franchise fees at least every five years unless the contract is for a lesser period of time.

§ 20c. New or additional services; preferential rights; operations by a single concessioner

The Secretary may authorize the operation of all accommodations, facilities, and services for visitors, or of all such accommodations, facilities, and services of generally similar character, in each area, or portion thereof, administered by the National Park Service by one responsible concessioner and may grant to such concessioner a preferential right to provide such new or additional accommodations, facilities, or services as the Secretary may consider necessary or desirable for the accommodation and convenience of the public. The Secretary may, in his discretion, grant extensions, renewals, or new contracts to present concessioners, other than the concessioner holding a preferential right, for operations substantially similar in character and extent to those authorized by their current contracts or permits.

§ 20d. Renewal preference for satisfactory performance; extensions; new contracts; public notice

The Secretary shall encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary. To this end, the Secretary, at any time in his discretion, may extend or renew a contract or permit, or

may grant a new contract or permit to the same concessioner upon the termination or surrender before expiration of a prior contract or permit. Before doing so, however, and before granting extensions, renewals or new contracts pursuant to the last sentence of section 20C of this title, the Secretary shall give reasonable public notice of his intention so to do and shall consider and evaluate all proposals received as a result thereof.

§ 20e. Concessioner's possessory interest in concession property; limitations; compensation for taking; determination of just compensation

A concessioner who has heretofore acquired or constructed or who hereafter acquires or constructs, pursuant to a contract and with the approval of the Secretary, any structure, fixture, or improvement upon land owned by the United States within an area administered by the National Park Service shall have a possessory interest therein, which shall consist of all incidents of ownership except legal title, and except as hereinafter provided, which title shall be vested in the United States. Such possessory interest shall not be construed to include or imply any authority, privilege, or right to operate or engage in any business or other activity, and the use or enjoyment of any structure, fixture, or improvement in which the concessioner has a possessory interest shall be wholly subject to the applicable provisions of the contract and of laws and regulations relating to the area. The said possessory interest shall not be extinguished by the expiration or other termination of the contract and may not be taken for public use without just compensation. The said possessory interest may be assigned, transferred, encumbered, or relinquished. Unless otherwise provided by

agreement of the parties, just compensation shall be an amount equal to the sound value of such structure, fixture, or improvement at the time of taking by the United States determined upon the basis of reconstruction cost less depreciation evidenced by its condition and prospective serviceability in comparison with a new unit of like kind, but not to exceed fair market value. The provisions of this section shall not apply to concessioners whose current contracts do not include recognition of a possessory interest, unless in a particular case the Secretary determines that equitable considerations warrant recognition of such interest.

§ 20f. Use of non-monetary consideration in leases of government property

The provisions of section 303b of Title 40, relating to the leasing of buildings and properties of the United States, shall not apply to privileges, leases, permits, and contracts granted by the Secretary of the Interior for the use of lands and improvements thereon, in areas administered by the National Park Service, for the purpose of providing accommodations, facilities, and services for visitors thereto, pursuant to sections 1 and 2 to 4 of this title, as amended, or sections 461 to 467 of this title, as amended.

§ 20g. Recordkeeping; audit and examination; access to books and records

Each concessioner shall keep such records as the Secretary may prescribe to enable the Secretary to determine that all terms of the concession contract have been and are being faithfully performed, and the Secretary and his duly

authorized representatives shall, for the purpose of audit and examination, have access to said records and to other books, documents, and papers of the concessioner pertinent to the contract and all the terms and conditions thereof.

The Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of five (5) calendar years after the close of the business year of each concessioner or subconcessioner have access to and the right to examine any pertinent books, documents, papers, and records of the concessioner or subconcessioner related to the negotiated contract or contracts involved.

(2)

Supreme Court, U.S.
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No. 95-1353

In The

Supreme Court of the United States

October Term, 1995

FORT SUMTER TOURS, INC.,

Petitioner,

v.

BRUCE BABBITT SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondent.

Petition for A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL PARK HOSPITALITY ASSOCIATION IN SUPPORT OF PETITIONER'S, FORT SUMTER TOURS, INC., PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Whether the abandonment of a longstanding agency policy – one of 36 years duration – required the Fourth Circuit to heighten its scope of judicial scrutiny and apply considerably less deference to the National Park Service's abandonment of that longstanding policy pursuant to this Honorable Court's holdings in *Motor Veh. Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29 (1983) and *Good Samaritan Hospital v. Shalala*, 508 U.S. ___, 124 L.Ed 2d 368 (1993).

2. Whether the adoption of a legislative rule by the National Park Service that changes the rights and obligations of private parties requires the agency to comply with the notice-and-comment provisions of the Administrative Procedure Act in the adoption of that regulation, pursuant to this Honorable Court's holding in *Lincoln v. Vigil*, 124 L.Ed.2d 101 (1993).

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the National Park Hospitality Association submits this brief *amicus curiae* in support of Petitioner, Fort Sumter Tours, Inc. Written consent to the filing of this brief has been granted by counsel for all parties, copies of which have been filed with the Clerk of the Court.

Amicus, the National Park Hospitality Association ("NPHA") is a non-profit corporation, incorporated in the State of Virginia. The NPHA's members are companies and business men and women who contract with the National Park Service ("NPS") to provide visitor services in units of the National Park System. The NPHA represents the interests of its members in all aspects of National Park System concession contracts and visitor services before the National Park Service and the public. The NPHA has approximately 150 members, including operators of virtually all of the major concessions throughout the National Park System. One of the NPHA's members is Fort Sumter Tours, Inc., ("FST").

This case presents the important and nationally-significant question of whether the National Park Service has interpreted 16 U.S.C. § 20b, regarding the application and calculation of concession franchise fees, in accordance with the will of Congress and in accordance with the requirements of the Administrative Procedure Act. As concessioners operating in the National Parks, NPHA members will be adversely affected by the outcome of this case. Moreover, since the setting of franchise fees, by the NPS, directly affects the ability of concessioners to continue concession operations within the National Park

System, all visitors to units of the National Park System will be adversely affected by the inability of concessioners to continue to operate concessions for the enjoyment of the visiting public.

OPINIONS BELOW, JURISDICTION, STATUTE INVOLVED AND STATEMENT OF THE CASE

Amicus Curiae hereby adopts Petitioner's description of the opinions below, jurisdiction, statutes involved and statement of the case.

REASONS FOR GRANTING THE WRIT

I. THE FAILURE OF THE FOURTH CIRCUIT COURT OF APPEALS TO REVIEW THE NATIONAL PARK SERVICE'S GUIDANCE DOCUMENT, NPS-48, WITH HEIGHTENED JUDICIAL SCRUTINY AND CONSIDERABLY LESS DEFERENCE IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH DECISIONS OF THIS HONORABLE COURT.

In reviewing challenged agency decisions, the scope of review is set out in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). As this Honorable Court has held, the APA requires a court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). Moreover, although agency action is entitled to a presumption of

regularity, "that presumption is not to shield . . . [agency] action from a thorough, probing, in-depth review." *Id.*

In applying this standard of review, this Honorable Court has specifically spoken to the situation presented in this case – an agency's change to longstanding policy. *Motor Veh. Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29 (1983) makes clear that court review of agency action that constitutes a reversal of longstanding agency policy is subject to close scrutiny. Moreover, the reviewing court must apply a presumption of correctness to the agency's previous, longstanding policy:

> A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to."

Motor Vehicle, at 41-42 (quoting *Atichison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973)). To overcome this presumption of correctness, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.* at 42.

In addition to applying a presumption of correctness to longstanding agency policy and requiring a heightened explanation from an agency changing longstanding policy, this Honorable Court has consistently held that less deference is owed in reviewing an agency's inconsistent policy. *See, Good Samaritan Hospital v. Shalala*, 508 U.S. __, 124 L.Ed 2d 368, 382-83 (1993) ("the consistency of an agency's position is a factor in assessing the weight that

position is due. As we have stated, 'an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view.'" (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987)); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 698 (1991) ("As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988)); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974) ("We have recognized previously that the weight of an administrative interpretation will depend, among other things, upon 'its consistency with earlier and later pronouncements' of an agency." (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

Notwithstanding the heightened judicial scrutiny and considerably less deference required by *Motor Vehicle* and *Good Samaritan* in a review of an agency's change to longstanding policy, the Fourth Circuit erroneously relied upon *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and deferred to the NPS's adoption of NPS-48.[1] NPS-48 is the NPS's 1986 abandonment of its prior, longstanding policy regarding the calculation of franchise fees pursuant to 16 U.S.C. § 20b(d). In this case, the NPS relied upon NPS-48 to justify a nearly three-fold franchise fee increase sought

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[1] Concessions Management Guidelines, National Park Service No. 48 (Release No. 2: Amendment No. 1) (March 6, 1987) ("NPS-48").

from FST.[2] Thus, the ultimate issue is whether NPS-48 is a proper interpretation of 16 U.S.C. § 20b(d).

In reviewing NPS-48, the Fourth Circuit should have applied this Honorable Court's decision in *Motor Vehicle* to afford a presumption of correctness to the NPS's prior, longstanding policy regarding the application and calculation of franchise fees and, additionally, to require from the NPS a heightened explanation for the abandonment of that longstanding policy. Moreover, the Fourth Circuit should have afforded "considerably less deference" to NPS-48, the NPS's new policy, pursuant to this Honorable Court's holding in *Good Samaritan*. Therefore, this Honorable Court should grant the Petition to review the decision of the Fourth Circuit regarding the proper scope of judicial scrutiny and level of deference to be applied in a challenge to an agency's change to longstanding policy.

A. The Fourth Circuit Should Have Applied A Presumption Of Correctness To The NPS's Prior, Longstanding Policy With Respect To The Calculation Of Concessioner Franchise Fees.

Franchise fees in concession contracts have been debated since the inception of concessions in National

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[2] The impact of the attempted increase is evidenced by reference to the years 1992 and 1993. At 4.25%, FST paid a franchise fee of $165,717.00 to the NPS for these two years. FST's net income from concession operations before income taxes was 8.67% and 7.77% of gross revenues, respectively. At 12%, over the same two years, what the NPS seeks under NPS-48, the fee would be $468,466.65, an increase of over $302,000. Net income from concession operations before income taxes would be 0.97% and 0.07% of gross revenue, respectively.

Parks. This debate is set forth in the legislative history of the Concessions Policy Act of 1965 ("CPA") found at S.R. No. 765, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Admin. News 3489 (hereinafter "Senate Report"). Prior to World War II concessioners were entitled to earn net profits equal to 6 percent of their investment before paying a franchise fee. This "priority" of net profits was to be cumulative from year to year, if not earned. Just prior to and during World War II, concessions were drastically curtailed and even closed. Thus, after the war, when they reopened, the "priority" of net profits due was substantial. As a result:

> little, and in some cases, no franchise fees were paid to the Government as a consequence of the built-up unearned priorities, although the profits and gross receipts of the concessioners were the highest they had ever experienced. This caused criticism of such a franchise fee basis by the Department in 1946. Alternate franchise fee bases, with definite profit limitations, were proposed by the Department for new contracts, but were . . . not acceptable to concessioners whose contracts were up for renewal.

Senate Report at 3496.

The impasse lead to the appointment, by the Secretary of the Interior, of a concessions advisory group that issued its report in 1948. Significantly, the report recommended that "the national parks should not be regarded as a (sic) revenue producing and that franchise fees should be abolished insofar as practicable." Senate Report at 3496. In 1950, the Secretary adopted policies controlling concession practices that remained in effect until the passage of the CPA. With respect to franchise

fees, these policies recognized "that adequate service to the public at reasonable rates is more important than the amount of franchise fees paid to the Government by the concessioner." Senate Report at 3497-98. Further, concessioner franchise fees were fixed as a percentage of gross receipts and fees could not be unilaterally increased by the NPS. See National Park Service, Concession Policies of the National Park Service, Oct. 13, 1950, *reprinted in* Park Concession Policy, Hearings before the Subcomm. on National Parks of the Comm. on Interior and Insular Affairs, 88th Cong., 2d Sess. 23-31 (1964).

Congress enacted the CPA, 16 U.S.C. § 20 *et seq.*, in 1965. Since its enactment, the text of the CPA has remained unchanged. Congress enacted the CPA principally:

> to put into statutory form policies which, with certain exceptions, have heretofore been followed by the National Park Service in administering concessions within units of the national park system and in writing contracts for concessionaire services there.

Senate Report at 3489.

In order to encourage private parties to invest in and to provide and operate facilities on land owned and managed by the U.S. Government for the benefit of the public, Congress provided specific inducements in the CPA for the concessioners who operate those facilities. With respect to the application and calculation of franchise fees, the CPA provides: (1) the Secretary shall exercise his authority in a manner consistent with "a reasonable opportunity for the concessioner to realize a profit on his operation as a whole commensurate with the

capital invested and the obligations assumed," 16 U.S.C. § 20b(b); and (2) franchise fees "shall be determined upon consideration of the probable value to the concessioner . . . . Such value is the opportunity for net profit in relation to both gross receipts and capital invested." 16 U.S.C. § 20b(d). Congress further instructed that:

> Consideration of revenue to the United States shall be subordinate to the objective of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates.

16 U.S.C. § 20b(d).

For 36 years, first under the 1950 policy and then under the explicit provisions of 16 U.S.C. § 20b(d), the NPS calculated franchise fees in relation to a concessioner's gross receipts and capital invested and did not increase franchise fees during the term of a concessioner's contract, absent mutual agreement. However, in 1986, the NPS issued NPS-48, a "guidance document" that requires the NPS to calculate average concessioner returns on the basis of gross receipts, equity, and assets.[3] Under NPS-48 these figures are compared to "representative" industry categories from the Dun & Bradstreet, Inc., publication *Industry Norms*.[4] Finally, NPS-48 requires the

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[3] 16 U.S.C. § 20b(d) mandates the use of only gross receipts and capital invested in determining franchise fees. Assets are not to be considered.

[4] In FST's case, the NPS compared FST with "Establishments Primarily Engaged in Furnishing Water Transportation of Passengers, Not Elsewhere Classified." Thus, FST was compared with "airboats (swamp buggy rides),"

NPS, as in FST's case, to adjust the concessioner's previously audited financial figures until they fall within the "representative" industry medians and to thereafter set the franchise fee. Moreover, NPS-48 announced that the NPS was abandoning its previous prohibition against the unilateral increase of franchise fees during a concession contract.

Motor Vehicle required the Fourth Circuit to begin its analysis of NPS-48 with the presumption that the NPS's prior, longstanding policy was correct. Instead, the Fourth Circuit, using *Chevron*, deferred completely to the NPS. At no time did the Fourth Circuit consider the fact that for 36 years the policy of the NPS – including its interpretation of federal statute since 1965 – had been opposite that of the policy contained in NPS-48. In fact, rather than consider how NPS-48 related to the longstanding policy of the NPS, as required by *Motor Vehicle*, the Fourth Circuit found "no problem with the application of NPS-48 to the agreement at hand." *Fort Sumter Tours, Inc., v. Babbitt*, 66 F.3d 1324, 1334 n.3 (4th Cir. 1995). Pet. App. at 15a. Thus, this Honorable Court should grant the Petition to review the decision of the Fourth Circuit that is in direct and irreconcilable conflict with *Motor Vehicle*.

"water taxis," and "transportation on river and canals," businesses that bear little, if any, resemblance to FST. See Dun & Bradstreet, Inc. *Industry Norms* (1994).

B. The Fourth Circuit Failed To Require A Reasoned Explanation From The NPS For Its Abandonment Of Longstanding Policy.

Under *Motor Vehicle*, to overcome the presumption of correctness that attaches to the NPS's longstanding policy with respect to the application and calculation of franchise fees, the NPS must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle*, 463 U.S. at 42. Thus, *Motor Vehicle* requires a reviewing court to determine whether the NPS's abandonment of its prior policy was "reasoned."

The Fourth Circuit erroneously failed to apply the heightened review required by *Motor Vehicle* to NPS-48. If the Fourth Circuit had employed the proper scope of judicial scrutiny to NPS-48, it would have had to review the NPS's longstanding policy and thereafter determine whether the NPS supplied a "reasoned analysis" for the abandonment of that longstanding policy. The Fourth Circuit did neither. Instead, applying *Chevron*, the Fourth Circuit required no explanation whatsoever from the NPS regarding its abandonment of longstanding policy and found "no problem with the application of NPS-48 to the agreement at hand." *Fort Sumter Tours, Inc.*, at 1334 n.3. Pet. App. at 15a.

The Fourth Circuit failed to apply the heightened judicial scrutiny required by *Motor Vehicle* to NPS-48, which abandoned the NPS's longstanding policy with respect to the application and calculation of concession

franchise fees. Indeed, the Fourth Circuit required absolutely no explanation whatsoever for the NPS's abandonment of longstanding policy. Therefore this Honorable Court should grant the Petition to review the decision of the Fourth Circuit which is in direct and irreconcilable conflict with *Motor Vehicle*.

C. The Fourth Circuit Should Have Afforded Considerably Less Deference To The NPS's Adoption Of NPS-48, An Abandonment Of Its Longstanding Policy.

This Honorable Court has consistently held that a reviewing court owes "considerably less deference" to an agency's change in a previously-held position. *See, Good Samaritan*, 124 L.Ed 2d at 382-83; and *Pauley*, 501 U.S. at 698. As discussed above, NPS-48 completely abandoned the NPS's previous interpretation of 16 U.S.C. § 20b(d) and reversed its even earlier, longstanding policy regarding franchise fees. In fact, by administrative fiat alone and with no accompanying change in federal statute, NPS-48 rewrites 16 U.S.C. § 20b(d), the statutory formula for calculating franchise fees, to include concessioner assets and a comparison of concessioner financial data to "representative" industries. Moreover, NPS-48 abandons the NPS's prior policy prohibiting a unilateral increase of concessioner franchise fees. Despite the abandonment of longstanding policy by the NPS, the Fourth Circuit, without reviewing NPS franchise fee history, or requiring any explanation from the NPS, erroneously applied *Chevron* and deferred to the NPS's adoption of NPS-48.

Because the Fourth Circuit erroneously deferred to the NPS's adoption of NPS-48, it ignored the heightened judicial scrutiny required by *Motor Vehicle*, for an agency's change to a longstanding policy. Therefore this Honorable Court should grant the Petition to review the decision of the Fourth Circuit which is in direct and irreconcilable conflict with *Good Samaritan*.

II. THE FOURTH CIRCUIT'S HOLDING, THAT NPS-48 IS ONLY A "GUIDANCE" DOCUMENT AND NOT A LEGISLATIVE RULE THAT REQUIRES COMPLIANCE WITH THE NOTICE-AND-COMMENT REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT, IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH A DECISION OF THIS HONORABLE COURT.

The Administrative Procedure Act, 5 U.S.C. § 553(b), requires an administrative agency to give notice of proposed new legislative rules by publishing the terms of the proposed rule or a description of the subjects and issues involved in the *Federal Register*. The agency must also give the public an opportunity to comment on the proposed rules before they are adopted and must consider those comments. 5 U.S.C. § 553(c). "The notice-and-comment requirements apply . . . to so-called 'legislative' or 'substantive' rules. . . . " *Lincoln v. Vigil*, 124 L.Ed.2d 101, 115 (1993) (citing *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1320 (1988) and *Community Nutrition Institute v. Young*, 818 F.2d 943, 945-946 (1987)).

The distinction between legislative rules and policy statements has been described as "tenuous," "blurred,"

and "enshrouded in considerable smog." *See, McLouth Steel Products Corp.* at 1320 and *Community Nutrition Institute* at 946. However, two criteria have been identified to assist courts in discerning the distinction. First, "[a] policy statement is one that . . . does not have 'a present day binding effect,' that is, it does not 'impose any rights and obligations,' and second, 'genuinely leaves the agency and its decision-makers free to exercise discretion.'" *McLouth Steel Products Corp.* at 1320 (quoting *Community Nutrition Institute* at 946 & n.4).

Although NPS-48 was used by the NPS to justify the three-fold increase to FST's franchise fees, the Fourth Circuit held that NPS-48 "is not a law or regulation, but rather is only a guideline for use by NPS in making calculations. We find no problem with the application of NPS-48 to the agreement at hand." *Fort Sumter Tours, Inc.*, at 1334 n.3. Pet. at 15a. In so holding, the Fourth Circuit erred because, in fact, NPS-48 is a legislative rule that must be promulgated in accordance with the notice-and-comment requirements of the APA. The holding of the Fourth Circuit thereby creates a direct and irreconcilable conflict with the decision of this Honorable Court in *Lincoln*.

A. NPS-48 Has A Present, Binding Effect.

The NPS uses NPS-48 to calculate concessioner franchise fees. In this case, the NPS used NPS-48 to calculate FST's franchise fees and to impose a three-fold increase to those fees. Indeed, in order to arrive at the franchise fee increase, the NPS used the formula contained in NPS-48 to adjust audited financial figures submitted by FST in

order to fit them within the statistics found in *Industry Norms*. Part of the financial revision to FST's audited financial figures, undertaken pursuant to NPS-48, consisted of: reducing FST's officer salaries by $162,742; invalidating FST's leasing arrangement for the "Spirit of Charleston;" and decreasing FST's actual equity by $347,700 "to approximate industry;" thereby increasing the NPS's calculation of FST's profits to $70,256.

Thus, with respect to this case, NPS-48 has had a present, binding effect and was used to significantly increase the obligations of FST under its concession contract. The Fourth Circuit erred in its holding that NPS-48 is "only a guideline" since, in fact, the NPS uses NPS-48 to "impose . . . obligations" upon concessioners, without having subjected NPS-48 to the APA's notice-and-comment requirements. Therefore, the holding of the Fourth Circuit creates a direct an irreconcilable conflict with the holding of this Honorable Court in *Lincoln*.

B. NPS-48 Constrains The NPS's Discretion.

NPS-48 was promulgated by the NPS to calculate concessioner franchise fees. NPS-48 calculates concessioner franchise fees, not only on gross receipts and capital invested as permitted by 16 U.S.C. § 20b(d), but also on the basis of assets. Moreover, the formula also requires the NPS to compare concessioners financial data to Dun & Bradstreet's *Industry Norms*, in a manner not permitted by 16 U.S.C. § 20b(d).

"If . . . the rule is based on an agency's power to exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative

one." *United Technologies Corp. v. EPA*, 821 F.2d 714, 719-20 (D.C.Cir. 1987). Moreover, "[i]f a statement denies the decisionmaker discretion in the area of its coverage, so that he, she or they will automatically decline to entertain challenges to the statement's position, then the statement is binding, and creates rights or obligations. . . . " McLouth Steel Products Corp., at 1320. When these principles are applied to NPS-48, it is clear that NPS-48 is a legislative, and not interpretative, rule subject to the notice-and-comment provision of the APA.

NPS-48 interprets 16 U.S.C. § 20b(d) to add additional factors for the NPS to consider. Moreover, NPS-48 is used to significantly affect the obligations imposed on concessioners during the term of their concession contracts. Thus, NPS-48 is not "only a guideline" but is indeed, a legislative pronouncement that requires the NPS to promulgated NPS-48 pursuant to the notice-and-comment requirements of the APA. Therefore, the holding of the Fourth Circuit that NPS-48 is only a "guideline" and not a legislative rule creates a direct and irreconcilable conflict with this Honorable Court's holding in *Lincoln*. As a result, this Honorable Court should grant the Petition in order to resolve this conflict.

CONCLUSION

For the foregoing reasons, the National Park Hospitality Association respectfully requests that this Court GRANT the Petition for *Writ* of *Certiorari* of Fort Sumter Tours, Inc.

Respectfully submitted,

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No. 95-1353

In the Supreme Court of the United States

OCTOBER TERM, 1995

FORT SUMTER TOURS, INC., PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly accorded deference to the determination of the National Park Service (NPS) that the National Park System Concessions Policy Act (CPA), 16 U.S.C. 20 *et seq.*, authorizes it to include in concession contracts a provision authorizing NPS to adjust franchise fees.

2. Whether the court of appeals correctly rejected petitioner's contention that the CPA forbids NPS from adjusting franchise fees without the agreement of the concessioner.

3. Whether the contention of amicus curiae that the "Concessions Guidelines" manual produced by NPS must be promulgated in accordance with "notice and comment" procedures is properly before this Court.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 66 F.3d 1324. The opinion and order of the district court (Pet. App. 23a-39a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1995. A petition for rehearing was denied on November 27, 1995. Pet. App. 22a. The petition for a writ of certiorari was filed on February 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Nearly all goods and services offered to the public within the national parks are provided by private-sector concessioners, pursuant to contracts with the National Park Service (NPS). In 1965, Congress enacted the National Park System Concessions Policy Act (CPA), Pub. L. No. 89-249, 79 Stat. 969 (1965), codified at 16 U.S.C. 20 *et seq.*, to provide statutory authorization and standards to govern concession contracts. The Act provides that

> the Secretary of the Interior shall take such action as may be appropriate to encourage and enable private persons and corporations (hereinafter referred to as "concessioners") to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the National Park Service.

16 U.S.C. 20a.

Within this broad grant of discretion, the Act also provides standards governing several aspects of the contractual relationship between NPS and a concessioner. For instance, the Secretary may include in concession contracts terms necessary to assure the protection of the concessioner's investment in structures, improvements, and other property. 16 U.S.C. 20b(a). The Secretary also must exercise his authority in a manner consistent with a reasonable opportunity for the concessioner to realize a profit. 16 U.S.C. 20b(b).

The Act also sets the groundwork for establishment and periodic adjustment of "franchise fees." Such fees, "however stated, shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular

contract or permit involved." 16 U.S.C. 20b(d). That value is "the opportunity for net profit in relation to both gross receipts and capital invested." *Ibid.* In determining the appropriate franchise fee, the Act requires that "[c]onsideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates." *Ibid.* Finally, the Act directs that "[a]ppropriate provisions shall be made for reconsideration of franchise fees at least every five years unless the contract is for a lesser period of time." *Ibid.*

2. NPS effectuates this statutory policy principally by means of the contracts into which it enters with concessioners.[1] Prior to enactment of the CPA, NPS used a contract clause that called for franchise fees to be reconsidered every five years but provided no mechanism for resolution of disputes between NPS and the concessioner. See *Park Concession Policy: Hearings Before the Subcomm. on National Parks of the House Comm. on Interior and Insular Affairs*, 88th Cong., 2d Sess. 39, 84 (1964) (*Park Concession Hearings*).

In 1975, the Comptroller General of the United States issued a report to Congress on NPS concessions management. The report noted that, while NPS contracts contained a provision for reconsidering franchise fees every five years, NPS did not

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[1] Although NPS has promulgated formal regulations addressing some aspects of the concessions program, those regulations do not deal with any issues regarding the reconsideration and adjustment of franchise fees. See generally 36 C.F.R. Pt. 51.

have an effective contract provision for resolving disputes over the appropriate franchise fees. See App., *infra*, 2a, 11a (discussing 1975 report). Among the Comptroller General's recommendations was a suggestion that NPS revise the standard concession contract to provide a means to resolve such disputes. *Id.* at 2a.

On July 13, 1976, NPS published a notice in the *Federal Register*, seeking comments on proposed changes in its standard concession contract and noting that the existing contract language "ha[d] not been significantly modified or revised since the enactment of [the CPA]." 41 Fed. Reg. 28,809. Under the proposed standard contract, if the parties could not agree on the appropriate franchise fee during the reconsideration period, the concessioner would be required to submit a written statement to the Secretary, who would then issue a written determination as to the appropriate franchise fee, which "shall be final and conclusive upon the parties hereto." *Id.* at 28,812.

After a series of further comment periods, see 41 Fed. Reg. 32,982 (1976); 42 Fed. Reg. 63,480-63,481 (1977), NPS modified the standard concession contract to read substantially as it does today. The modified contract language was adopted on November 11, 1978, and continued in use through the execution of the latest contract between petitioner and NPS on June 13, 1986. See 46 Fed. Reg. 14,460-14,461 (1981) (discussing development of the standard contract).

Section 9(e) of the standard contract (formerly section 9(d)) provides that the amount and character of the franchise fees may be reconsidered "at the instance of either party" within 60 days after the end of each five-year period. See 46 Fed. Reg. 14,467

(1981). If the parties cannot agree on the appropriate franchise fees, the concessioner must reduce its position to writing and submit it to the Secretary "for a determination of appropriate fees consistent with the fair value of any assigned Government Improvements and the probable value to the Concessioner of the privileges granted by this contract based upon a reasonable opportunity for profit in relation to both gross receipts and capital invested." *Ibid.*

Section 9(e) also provides a dispute resolution mechanism: "If desired by the Concessioner an advisory arbitration panel will be established (one member to be selected by the Secretary, one by the Concessioner, and the third by agreement of the original two) for the purpose of recommending to the Secretary appropriate franchise fees." 46 Fed. Reg. 14,467 (1981). The panel's recommendations are merely advisory; "[t]he written determination of the Secretary as to franchise fees shall be final and conclusive upon the parties hereto." *Ibid.*[2]

In addition to promulgating the standard concession contract, NPS has established a methodology for determining appropriate franchise fees. That methodology is set forth in chapter 24 of the "Concessions Guidelines," the guide used by NPS employees in administering concessions and commonly referred to as "NPS-48." 51 Fed. Reg. 47,314 (1986). NPS-48 does not change any of the contract terms

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[2] NPS altered the standard contract in 1993, see 58 Fed. Reg. 3140, after NPS and petitioner had entered into the contract at issue here. While the advisory arbitration provision of section 9(e) has been amended, the language making the Secretary's determination "final and conclusive" remains the same. See *id.* at 3142, 3151-3153.

that have been constant for all concession contracts since 1978. Rather, it is used to guide agency personnel in carrying out the Secretary's responsibilities under the contract and the Act. See *Lake Mohave Boat Owners Ass'n* v. *National Park Serv.*, 78 F.3d 1360, 1368-1369 (9th Cir. 1995).

Prior to 1985, NPS determined the appropriate franchise fee by analyzing financial statements submitted by the concessioner and determining a minimum fee, adjusted to take into account economic considerations involved with the operation. See 50 Fed. Reg. 31,926, 31,927 (1985). In 1985, however, NPS announced an amendment to the standard. *Ibid.* Under the amended policy, NPS determines the concessioner's annual gross receipts and adjusted net income, and arrives at both a minimum and a maximum fee. The final franchise fee is set between the minimum and the maximum, "based on the concessioner's profitability history in comparison with reported industry statistics." *Id.* at 31,927. That methodology was formally adopted December 31, 1986, and later incorporated into NPS-48. 51 Fed. Reg. 47,314 (1986).

3. Since 1961, petitioner has provided tour boat services and sold souvenirs and refreshments to visitors to Fort Sumter National Monument, a unit of the National Park System, under a series of concession contracts. Pet. App. 2a-3a. Its current concession contract covers the period of June 13, 1986, to December 31, 2000. *Id.* at 3a.

Section 9(a) of the contract established an initial franchise fee of 4.25% of petitioner's annual gross receipts. Section 9(e) authorizes reconsideration of the franchise fee at the end of each five-year period of the contract at the request of either party. Pet. App.

3a. As with the standard concession contract discussed above, section 9(e) of petitioner's contract also authorizes the Secretary to make a "final and conclusive" decision regarding the appropriate franchise fee, subject to advisory arbitration at petitioner's request. *Id.* at 10a-11a.

On June 20, 1991, NPS's Southeast Regional Director notified petitioner that NPS was "considering renegotiating" petitioner's franchise fee. Pet. App. 3a. NPS thereafter prepared a "Franchise Fee Analysis" that concluded that a 12% franchise fee was appropriate for the five-year period of the contract beginning June 13, 1991. *Ibid.* NPS also informed petitioner that it was willing to meet to discuss this determination. *Ibid.* Petitioner declined a second invitation to discuss the fee, as well as a subsequent request that it put its objections in writing. *Ibid.*

Petitioner instead brought this suit on April 21, 1993, seeking a declaratory judgment of its rights and obligations under both the CPA and its contract with NPS. Pet. App. 3a. Subsequently, NPS advised petitioner in June 1993 that, because petitioner had refused to negotiate or to use the contractual advisory arbitration provisions, NPS had completed its review of the record and determined that a fee of 12% was appropriate. *Id.* at 3a-4a.

The district court sustained the Secretary's decision, Pet. App. 23a-39a, and the court of appeals affirmed, *id.* at 1a-21a. The court of appeals first rejected petitioner's argument that the CPA does not grant NPS authority to consider profits when determining franchise fees, noting that "the CPA itself quite explicitly permits the calculation of a franchise fee in relation to the profits that can be expected by a concessioner." *Id.* at 7a. The court

next rejected petitioner's argument that the CPA does not allow NPS to adjust franchise fees without the concessioner's agreement. The court held that the statutory language mandating "reconsideration" of fees does not resolve whether unilateral adjustment of fees is permitted. *Id.* at 8a. The court then held that NPS's interpretation of the Act as providing for both the reconsideration and adjustment of franchise fees "is a completely logical one, and should be upheld." *Id.* at 9a. "In fact," the court concluded, "NPS's interpretation is persuasive; a statutory provision calling for reconsideration of fees would be rendered meaningless if it did not include authority for the adjustment of fees as well." *Ibid.*

Finally, the court of appeals held that the contract provision providing for the fee adjustment is an "appropriate provision" for reconsideration of fees within the meaning of the Act, Pet. App. 10a-12a, and that the method used by NPS to calculate the franchise fee is reasonable, *id.* at 14a-21a.

ARGUMENT

The court of appeals correctly rejected petitioner's challenge to the Secretary's decision to adjust the franchise fee applicable to petitioner's concession contract. That decision is consistent with the rulings of this Court and is not in conflict with any decision of another court of appeals. Further review is not warranted.

1. Petitioner contends that the court of appeals erred in according deference to NPS's interpretation of the CPA under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Petitioner raised two separate arguments in the court of appeals con-

cerning NPS's statutory authority, contending that: (1) the CPA does not allow NPS to increase franchise fees unilaterally; and (2) the CPA does not grant NPS authority to limit concessioner profits. With respect to the former contention, the court of appeals did accord deference to the Secretary's interpretation that the CPA allows for a unilateral adjustment of franchise fees. See Pet. App. 8a-9a. The court of appeals resolved the latter contention, however, on the basis of the plain language of the Act, without reference to *Chevron* deference. See *id.* at 5a-7a.

a. Petitioner argues that deference to NPS's policy allowing unilateral increases in franchise fees is not warranted for three reasons. Each objection is groundless.

i. Petitioner first points out that NPS-48 is an informal guidance document that was not published for notice and comment. Because informal policies are not entitled to the full measure of deference afforded formal rules that go through notice and comment, petitioner contends, the court of appeals erred in according *Chevron* deference to NPS's interpretation.

Petitioner is correct that NPS-48 is a general statement of internal policy that is not subject to the notice-and-comment procedures of the Administrative Procedure Act. See *Lake Mohave Boat Owners Ass'n*, 78 F.3d at 1368. And informal agency policies, while entitled to some weight on judicial review, may receive a lower degree of deference. See *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991). Those considerations, however, do not help petitioner, for the policy at issue here appears not just in NPS-48 but also in standard contract terms that have been published

repeatedly in the *Federal Register* for notice and comment.

The standard contract language adopted in 1978—which appears in the specific contract at issue here—explicitly provides that the Secretary may impose an adjustment in the franchise fee, and that the Secretary's decision is "final and conclusive." The Secretary published that language in 1976 for notice and comment, 41 Fed. Reg. 28,809, and twice extended the deadline for receipt of comments before adopting the language, 41 Fed. Reg. 32,982 (1976); 42 Fed. Reg. 63,480 (1977). The Secretary again published the entire contract in the *Federal Register* in 1981. 46 Fed. Reg. 14,460. Moreover, the most recent amendments to the standard concession contract also were adopted after notice and comment. See 58 Fed. Reg. 3140 (1993).

In addition, NPS included the provision authorizing the adjustment of fees in accordance with the explicit direction from Congress to include "[a]ppropriate provisions" in its concession contracts "for reconsideration of franchise fees at least every five years." 16 U.S.C. 20b(d). Because the Secretary's interpretation of the Act in the standard contract provisions "assumes a form expressly provided for by Congress," it is "as much an exercise of delegated lawmaking powers" as the Secretary's promulgation of formal regulations. *Martin* v. *OSHRC*, 499 U.S. at 157; see also *Commonwealth Edison Co.* v. *United States Dep't of Energy*, 877 F.2d 1042, 1045 (D.C. Cir. 1989) (holding that deference is appropriate for standard contract terms published for notice and comment). The court of appeals therefore correctly held that *Chevron* deference is appropriate.

Even if NPS's interpretation appeared only in the informal setting of NPS-48, petitioner's argument would fail. Even informal guidelines are entitled to "some deference." *Reno* v. *Koray*, 115 S. Ct. 2021, 2027 (1995). In the case at bar, the court of appeals held that NPS's interpretation of the Act is not merely "logical" but indeed "persuasive." Pet. App. 9a.

ii. Petitioner next contends (Pet. 15) that deference is inappropriate because NPS's decision to authorize unilateral fee increases represented an "unexplained swerve from forty years of practice." Central to petitioner's contention is the assertion (Pet. 6, 11 & n.2, 13) that NPS first announced its position in a 1987 amendment to the "Concessions Guidelines" in NPS-48—after petitioner signed its latest concession contract. In fact, NPS's interpretation was adopted long before the 1987 amendment to NPS-48. Since 1978, the Standard Concession Contract developed by NPS has contained explicit language giving NPS the authority to adjust franchise fees unilaterally.

In addition, petitioner mistakenly interprets the earlier NPS contractual provision (which did not provide unilateral authority to adjust franchise fees) as an interpretation of the Act as not permitting such an adjustment.[3] At no point did NPS interpret the CPA as precluding a unilateral adjustment in franchise fees. Rather, NPS has merely acknowledged that previous *contractual* provisions provided for

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[3] Amicus National Park Hospitality Association makes the same mistake, asserting (at 9) that "NPS-48 announced that the NPS was abandoning its previous *prohibition* against the unilateral increase of franchise fees." (Emphasis added.)

reconsideration without authorizing NPS to adjust fees when the concessioner does not agree.[4] Indeed, in the very first amendment to the standard contract following the enactment of the CPA, NPS adopted language allowing the Secretary to adjust franchise fees and making the Secretary's determination final and conclusive. See 41 Fed. Reg. 28,812 (1976).[5]

iii. Equally without merit is petitioner's contention (Pet. 17) that NPS's interpretation is not worthy of deference because it is "self-serving." The two cases upon which petitioner relies suggest that deference may not be appropriate for agency interpretations that retroactively affect existing contracts to which the agency is a party. See *Transohio Sav. Bank* v. *Director, OTS*, 967 F.2d 598, 614 (D.C. Cir. 1992); *National Fuel Gas Supply Corp.* v. *FERC*, 811 F.2d 1563, 1571 (D.C. Cir.), cert. denied, 484 U.S. 869 (1987). In such cases, concern may arise because "deference might lead a court to endorse self-serving views that an agency might offer *in a post hoc*

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[4] Contrary to petitioner's assertion (Pet. 12), NPS-48 did not acknowledge a change in agency policy in 1987. Rather, the guideline merely acknowledged that "[t]he old standard contract language requires that any decision to change a franchise fee during a reconsideration period must be mutually agreed to by both parties. That is, if either party does not agree, no change can be effected in the franchise fee." See App., *infra*, 19a.

[5] Moreover, that amendment followed shortly after the Comptroller General submitted a report to Congress criticizing the lack of a dispute-resolution mechanism and recommending an amendment to the standard concession contract. See App., *infra*, 2a. A subsequent Comptroller General report noted that the amended standard contract appeared adequate to address its concerns. *Id.* at 3a.

reinterpretation of its contract." *National Fuel*, 811 F.2d at 1571 (emphasis added).

In the case at bar, by contrast, NPS's interpretation of the statute as authorizing the Secretary to adjust franchise fees is not a post-hoc reinterpretation of any concession contract. The 1978 decision to change the terms of the standard concession contract did not alter any existing contracts; it merely provided that *future* contracts would contain the amended language. As with all such contracts, petitioner's contract with NPS explicitly provided that the Secretary's decision as to the appropriate franchise fee would be "final and conclusive." Thus, petitioner's repeated assertions (Pet. 9, 10, 18, 20) that NPS has sought to "rewrite" essential contract terms and upset settled expectations are unfounded.

b. As explained above, the authority to order an adjustment in franchise fees was published for notice and comment and has existed continuously in the standard contract since 1978, independent of NPS-48, but NPS-48 *is* relevant to a separate argument made by petitioner in the court of appeals. Petitioner argued below that the methodology used in NPS-48 to calculate franchise fees is an attempt to "limit" concessioner profits, and that the CPA does not authorize NPS to adjust fees in order to limit profits. The methodology for determining fees was amended in late 1986 and incorporated into NPS-48 in 1987.

To the extent petitioner argues that the court of appeals erred in according *Chevron* deference to the methodology used to calculate franchise fees, it misreads the court of appeals' opinion. In rejecting petitioner's argument that NPS lacks statutory authority to "limit" concessioner profits, the court of appeals did not defer to NPS-48. Rather, the court

held that the express language of the Act "permits the calculation of a franchise fee in relation to the profits that can be expected by a concessioner." Pet. App. 7a.

2. The matter of *Chevron* deference to one side, petitioner contends (Pet. 18-20) that the court of appeals erred in holding both that the CPA does not prohibit NPS from adjusting franchise fees in order to "limit" profits and that the CPA allows NPS to adjust fees unilaterally.

a. In arguing that the CPA does not allow NPS to "limit" profits, petitioner relies primarily on an entirely separate statute, the Renegotiation Act of 1951, 50 U.S.C. App. 1211-1233 (1964) (repealed 1978). Petitioner argues (Pet. 18-19) that the CPA should be read *in pari materia* with the Renegotiation Act because the latter Act was amended by the same Congress that enacted the CPA. Because Congress declined to extend the provisions of the Renegotiation Act to NPS, petitioner contends, the CPA should not be read to allow NPS to adjust franchise fees in a way that limits concessioner profits.

Petitioner's reliance on the Renegotiation Act is misplaced. That Act did not apply to NPS for one simple reason: it was aimed at defense contracts. See Renegotiation Act of 1951, § 101, 50 U.S.C. App. 1211 (1964) (declaring that "sound execution of the national defense program requires the elimination of excessive profits from contracts made with the United States"). Moreover, petitioner's suggestion (Pet. 19) that Congress could have extended the Renegotiation Act to cover NPS when it "amended" the Act in 1966 is dubious. Far from substantively amending the Renegotiation Act in 1966, Congress merely extended

its expiration date. See Act of June 30, 1966, Pub. L. No. 89-480, 80 Stat. 232.

Nor does the language of the CPA itself support petitioner's contention. Petitioner points out (Pet. 19-20) that the CPA provides concessioners a "reasonable opportunity * * * to realize a profit," see 16 U.S.C. 20b(b), but never explains how NPS's policy violates that principle. As the court of appeals recognized (Pet. App. 7a), the CPA expressly provides for the consideration of concessioner profits in setting franchise fees: it requires that franchise fees "shall be determined upon consideration of the probable value to the concessioner of the privileges granted," and then defines that value as "the opportunity for net profit in relation to both gross receipts and capital invested." 16 U.S.C. 20b(d). Since the value of the concession privileges is related to the profit potential of the enterprise, NPS reasonably takes into account the concessioner's profitability history in comparison with industry statistics in setting the appropriate franchise fee.

Petitioner suggests (Pet. 10) that there is a clear statement rule concerning grants of authority to affect the profit margin of companies with which the government deals. Specifically, petitioner cites *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 309 (1942), for the proposition that "[t]he government may limit the profitability of companies doing business with it—but only with explicit Congressional approval." Pet. 18. That proposition, however, is not an accurate statement of the law, and *Bethlehem Steel* does not support petitioner's contention.

At issue in *Bethlehem Steel* was "a dispute * * * about the amount of profits claimed by Bethlehem under thirteen war-time contracts for building

ships." 315 U.S. at 292. The contracts granted Bethlehem a bonus if the actual cost turned out to be lower than the cost estimated at time of contracting. *Id.* at 296. The Court rejected the government's attempts to import limitations on Bethlehem's "savings" bonus not contained in the contractual provisions. In closing, the Court noted that, "[t]o meet th[e] recurrent evil [of wartime profiteering], Congress has at times taken various measures. * * * But if the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this Court, the power to make them." *Id.* at 309. Here, in contrast, it is petitioner, not the government, that seeks to evade the explicit terms of its contract, and *Bethlehem Steel* is of no assistance.

b. Petitioner's contention (Pet. 20) that the CPA prohibits the unilateral adjustment of fees also is flawed. Petitioner's only argument is that Congress did not enact an earlier version of the bill that would have authorized provisions for the "reconsideration and adjustment" of fees, ultimately enacting language referring only to "reconsideration."

As the court of appeals explained, however, the original draft of the CPA stated that contracts "may" include provisions "for periodic reconsideration and adjustment of franchise fees," while the final version stated that appropriate provisions "shall" be made "for reconsideration of franchise fees." See Pet. App. 8a. Thus, "[a]n equally plausible reason for the deletion of the word 'adjustment' is that Congress chose to make reconsideration of franchise fees mandatory as opposed to permissive (and therefore substituted 'shall' for 'may'), but did not wish to require adjustment of fees every five years (therefore deleting

'adjustment'). In other words, although NPS should reconsider fees every five years, the fees need not actually be changed that often." *Id.* at 9a.

Indeed, making any change in franchise fees dependent upon the agreement of the concessioner would undermine the goal of the Act. The CPA was passed after numerous congressional committees investigated park concessions, reported that franchise fees were too low, and recommended that franchise fees be increased. See *Park Concession Hearings* 8, 32, 73. The Comptroller General also submitted a report to Congress recommending an increase in franchise fees. In addition, the Comptroller General specifically criticized the lack of a dispute resolution process during renegotiation of franchise fees, and recommended that any dispute over fees be resolved by the Secretary, whose decision should be "final and conclusive." *Id.* at 39.

Given those recommendations, NPS reasonably interpreted the CPA as allowing adjustment of fees as part of the "reconsideration" it authorizes. As the court of appeals noted, "a statutory provision calling for reconsideration of fees would be rendered meaningless if it did not include authority for the adjustment of fees as well." Pet. App. 9a.[6]

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[6] In recent hearings before Congress, the Secretary noted his concern that concessioners would not voluntarily agree to an increase in franchise fees. *Concessions Policy of the National Park Service: Hearings Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, 101st Cong., 2d Sess. 43-44 (1990); see also *id.* at 157 (President of National Parks and Conservation Association was "unaware of any case where a concessioner agreed to an increase in fees when the contract had the 'mutual agreement' clause").

3. Finally, the brief for amicus National Park Hospitality Association seeks to raise an entirely new issue, arguing that NPS-48 is not merely a "guidance" document and therefore must be promulgated in accordance with the notice-and-comment procedures of the Administrative Procedure Act (APA) (see Amicus Br. 12-15). Since the NPS-48 methodology for calculating franchise fees at issue here was adopted after published notice and receipt of comments (see 51 Fed. Reg. 47,314 (1986)), and since broader issues concerning other provisions of the NPS-48 were not raised below and are not raised in the certiorari petition, the Court should not consider them.

In any event, the new argument raised by amicus is misguided. The APA notice-and-comment procedures do not apply to "a matter relating to agency management or personnel *or to public property, loans, grants, benefits, or contracts.*" 5 U.S.C. 553(a)(2) (emphasis added). Since NPS-48 contains guidelines for public concession contracts, Section 553(a)(2) plainly exempts it from the notice-and-comment requirements of the APA. NPS-48 also falls within the exception for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(3)(A). It merely provides guidance to NPS staff in carrying out the function called for both in the contract and in the CPA: determining a franchise fee that will accurately value the concession rights at issue and provide the concessioner with a reasonable opportunity for a profit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX A

REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES

Better Management Of National Park Concessions Can Improve Services Provided To The Public

Although the National Park Service has made some improvements in its management of concession operations in accordance with GAO's 1975 recommendations, much more needs to be done. Among other things, the Park Service needs to ensure that concession facilities are safe and sanitary and that park visitors receive quality services at reasonable prices.

GAO recommends a number of steps to improve management of concession operations in the parks.

The Congress should amend the Concessions Policy Act of 1965 to help improve the Park Service's ability to manage concessions operations.

[GAO seal]

CED-80-102
July 31, 1980

[67]

CHAPTER 7

FRANCHISE FEE RATE STRUCTURE NEEDS REVISION

The Concessions Policy Act of 1965 authorizes NPS to charge concessioners a franchise fee based on the value of the privileges granted under their contracts. In our 1975 report, we stated that we could not evaluate the basis NPS used to establish its franchise fee formula structure to determine if it was proper because essential supporting data was not available. We found that NPS did not adequately justify the rates charged and had not established criteria to help evaluate pertinent economic factors that may warrant changes in the established formula rate. Also, NPS did not have an effective contract provision to resolve disputes arising during redetermination of the franchise fee rate.

To resolve these problems, we recommend that NPS restudy the franchise fee rate structure, develop guidelines to help evaluate pertinent economic factors, and develop procedures for waiver of franchise fees. We also recommended that NPS (1) reemphasize the need to provide adequate documentation for the rates charged when they differ from the rates set by the formula and (2) revise the concession contract renegotiation provisions to provide an equitable means to settle disputes.

During our current review, we found that very little had changed since 1975 in regard to franchise fees. Our 1975 recommendations had not been imple-

mented. The franchise fee rate structure, which is based on a formula developed in 1965, does not assure that rates charged reflect the value of the privileges granted under concession contracts, and NPS spends a great deal of time determining what the rates should be. In 1978 the average franchise fee rate was less than 2 percent. Also NPS personnel who set the rates generally did not have the financial backgrounds and experience to facilitate financial analysis of concession operations. NPS plans to hire a consulting firm to develop a new system; but unless NPS personnel can properly apply the system, the rate setting will not be greatly improved.

NPS has incorporated franchise fee renegotiation procedures in its standard language contract that appear adequate. However, renegotiation will continue to be a problem under existing contracts that do not contain the new provision. It will be a number of years before many of these [68] contracts expire and the new provisions are added to the contracts.

NPS FRANCHISE FEE RATE STRUCTURE UNCHANGED SINCE 1965

The franchise fee provision of NPS concession contracts generally provides that the concessioner will pay a franchise fee based on a percentage of gross receipts as well as a charge for Government-owned facilities used by the concessioner. NPS' franchise fee rate structure is based on a formula NPS developed in 1965. The structure has not been analyzed since that time to see if it still reflects the value of privileges granted concessioners under their con-

tracts. NPS officials believe the structure needs to be changed and plan to develop a new system.

Under the formula method, NPS separates concessioners' sales into four basic types of operations and applies a specific rate to an existing concessioner's past actual sales or a new concessioner's estimated future sales for each type of operation. The four basic types of concession operations and the rates applied to gross sales in each category are (1) food, lodging, and saddle horses—3/4 percent, (2) gasoline, transportation, and photographic supplies and services—3 percent, (3) souvenir and curio sales—5 percent, and (4) all other operations, including grocery stores and snack bars—1-1/2 percent. The formula rate is then determined by dividing the total amount of franchise fees by the total amount of gross sales for the period.

The following example demonstrates how NPS arrives at a formula rate of 1.33 percent for an existing concessioner providing service in all four categories of concession operations.

[69]

Category	Average annual gross sales 1974-78 (000 omitted)	Formula rate (percent)		Amount of franchise fee
Food and lodging services	$4,000	3/4	=	$30,000
Transportation, service station	750	3	=	22,500
Souvenirs	275	5	=	13,750
All other sales	400	1-1/2	=	6,000
Total	$5,425			$72,250

Concessioner's formula rate: $72,250 ÷ $5,425,000 = 1.33 percent.

NPS could not provide data to support the rates established for each of the four basic types of operations. NPS has not analyzed these rates since 1965 to determine if they are still adequate.

NPS guidelines provide that the franchise fee rate charged a concessioner can be adjusted higher or lower if warranted by pertinent economic factors. However, as we reported in 1975, NPS had not developed criteria or guidance for its personnel to use in evaluating economic factors that may warrant increasing or decreasing the formula rate. Consequently, NPS personnel have to rely upon their own judgment in considering what impact economic factors should have on the rates and when to apply them. Factors which could affect concessioners' rates include net profit and rate of return on investment.

A financial analyst from NPS' Western Regional Office told us that because adequate guidance on "pertinent economic factors" has not been provided to NPS personnel, each region has developed its own criteria for determining appropriate franchise fee rates. He said that NPS' franchise fee formula is out of date. He stated that it was adequate when developed in 1965 but now has no relation to the value of the privileges concessioners are granted under their contracts. He believes that the formula must be updated or a new methodology created that relates franchise fees to the value of privileges granted concessioners. The Yosemite Chief of Concessions held the same opinion and said that, [70] without a realistic basis for setting rates, there will be many

disputes between NPS and concessioners over what is an adequate fee but no way to resolve them.

NPS' Chief of the Concessions Management Division agreed that the current franchise fee structure is inadequate and that a new structure needs to be developed. He said that NPS plans to hire a consulting firm in mid-1980 to develop a franchise fee system that will reflect the value of privileges granted under concession contracts. In 1978 NPS collected about $4.2 million in franchise fees from concessioners on gross receipts of about $220 million. This represented an average franchise fee rate of less than 2 percent.

NPS' draft proposal to seek a contractor to develop a viable franchise fee system, dated April 11, 1980, states that the present system is behind the state of the art and needs to be studied and compared to other franchise fee systems in the private and Federal sectors. It states that NPS does not have a system that "expresses franchise fees in a defendable manner." According to the draft proposal, by analyzing the current NPS franchise fee rate structure, franchise fee systems used by others, and other pertinent information, the consulting firm is to recommend and develop the best system for NPS.

We agree with NPS' decision to develop a new franchise system. We believe that the system developed should be easily understood by concessioners and NPS personnel who set the rates. The system should be thoroughly supported and documented and include provisions for periodic review to assure that it continues to be valid. If the new system includes adjustment of individual rates based on pertinent

economic factors, NPS should develop guidelines for its staff to use in making such adjustments.

Rate determination inadequate and time consuming under current procedures

As we have stated, NPS did not establish criteria to assist its staff in evaluating economic factors that may warrant a change in the franchise fee rate. We found that when rates were adjusted, opinions often differed over what the rate should be. Also, NPS was spending a lot of time analyzing and discussing individual franchise fee rates. In fact, as the following example shows, even the NPS Director became involved in setting a concessioner's rate.

[71] The problems of determining rates under the current structure is illustrated by a case at Yosemite involving a a concessioner that operates a photographic studio. Following is a chronology of events in this case.

—May 1974—NPS granted the concessioner a reduction in its franchise fee rate from 5 percent to 1 percent. The rate was to return to 5 percent on October 1, 1978, unless a different rate was negotiated.

—July 1978—an analysis prepared by NPS' Concessions Management Division in Washington showed that the minimum rate charged the concessioner as of October 1, 1978, should be 4.74 percent.

—September 1978—the concessioner requested the rate not be returned to 5 percent.

—October 1978—based on an analysis prepared by the Yosemite Chief of Concessions, a 3.3-percent franchise fee rate was proposed to the concessioner.

—November 13, 1978—the Director of NPS' Western Region stated that in considering the concessioner's profit, the region could see no justification for reducing the rate below 5 percent.

—November 27, 1978—the concessioner met with the NPS Director, and the Director set the franchise fee rate at 2 percent for a 2-year period, which was later changed to a 1-year period.

The meeting between the concessioner and the Director took place without the knowledge of NPS concession management officials in the field and at headquarters. The owners were accompanied at the meeting by their attorney—a former NPS Director. According to the Director, the concessioner appealed to have the franchise fee rate remain at 1 percent based on its public service program in the park and its stock of limited edition photographic prints. The prints are sold to the public and when the supply is exhausted, the concessioner's gross receipts and profit margin may be affected. The Director said that he set the fee rate at 2 percent to judge its impact on the concessioner's service and profitability. He said that it was his intention to raise the fee to 5 percent if the concessioner was not adversely affected by the increase.

However, in an August 24, 1978, memorandum, the Yosemite Park Superintendent stated that the

concessioner's "so-called [72] public services" were developed voluntarily by the concessioner and many are designed to enhance and promote concessioner sales. He said that the programs by themselves do not warrant a reduced franchise fee rate. Also, as stated above, concessions management officials at headquarters and in the field believed that the concessioner was capable of paying a higher fee.

The Chief of NPS' Concessions Management Division told us that the rate reverted to 5 percent in October 1979 and is expected to remain at that rate until the concessioner's contract expires on September 30, 1983.

We believe that this case illustrates the need for NPS to develop a franchise fee rate system that is easily understood and applied by NPS personnel who set the rates. In developing a new system, we believe that the amount of subjective analysis required in setting the rates, which results in second guessing, should be kept to a minimum. A good franchise fee rate system should eliminate the need for the numerous analyses and many discussions that occurred in the Yosemite case, as well as other cases we noted, and should assure that concessioners' rates are fair and equitable.

LACK OF STAFF WITH FINANCIAL BACKGROUND HINDERS RATE SETTING

Most NPS regional office personnel responsible for setting fee rates lacked financial backgrounds to facilitate financial analysis of concession operations. Without a financial background, staff members can have difficulty evaluating factors such as net income

or return on investment that may warrant a higher or lower franchise fee.

A September 1977 report entitled "Profitability and Operating Cost Benchmarks; Analysis of the Concessioner Annual Financial Report," prepared for NPS by a private consulting firm, identified the lack of financial experience in NPS' field offices. The report points out that of all the concessions management personnel at the nine NPS regional offices and headquarters, only four were accountants. It states that NPS personnel at the regional and park levels devote only a small amount of time to working with the financial aspects of a concession operation. According to the report, the average concession specialist spent only about 10 to 15 percent of the time working with the information from the concessioners' annual financial report. The report [73] points out that even though some qualified financial/accounting/management employees work in the regional and park concession management offices, they generally have "more pressing" activities to attend to.

Another 1977 study of concessions management operations made by NPS' Concessions Management Division reported that only one or perhaps two NPS regions made satisfactory analyses of concessioners' financial operations. The study, which covered all nine NPS regions, found that the regions' staff did not have financial backgrounds nor were they qualified to adequately review and follow through on analyses of concessioner financial reports. According to the report only the Western Region had concession specialists with accounting backgrounds.

The Chief of the Finance Branch, NPS Concessions Management Division, told us that the situa-

tion in NPS' regional and park offices has not improved since 1977. He said that very few people in concessions management have the financial background needed to evaluate the financial aspects of concessions operations. The Chief of NPS' Concessions Management Division agreed. He said that only a few concession specialists in the field have the type of background needed to effectively handle the financial and contracting aspects of concessions management.

A new system for setting franchise fee rates could provide much needed guidance and assistance to concession management personnel and help create a consistent NPS-wide approach. However, unless the system is easily understood and applied by the people responsible for setting rates, the overall improvement may be slight. NPS will need personnel with appropriate financial backgrounds and experience to administer whatever system it develops.

FRANCHISE FEE RENEGOTIATION PROVISION APPEARS ADEQUATE

In the 1975 concessions management report, we pointed out that NPS contracts generally contain a provision that the franchise fees be evaluated every 5 years. However, the contracts did not provide a means for settling disputes over adjustments in the franchise fees. If the concessioner and NPS could not agree on the amount of the new fees, neither NPS nor the concessioner could require a change in the fees.

[74] Since 1975 NPS has incorporated procedures in its standard language contract and concessions manual for renegotiating franchise fee rates after

specified periods during the term of concession contracts. These procedures appear to be adequate for settling disputes that arise during periods of renegotiation. However, renegotiation of franchise fees will continue to be a problem under existing contracts that do not contain a provision for these procedures because concessioners can refuse to allow the franchise fee fate or charge for the use of Government-owned facilities to be increased. The new procedures will not apply to these concessioners until their contracts expire and new contracts that include these procedures are negotiated. As of March 1980 only 5 of NPS' 123 existing contracts contained the renegotiation provisions. Most of these contracts will expire between 1980 and 1984; however, many will not expire until the late 1980s and 1990s.

NPS' new renegotiation provisions provide that within 60 days after the end of each 5-year period of the contract, or as otherwise specified in the contract, either the concessioner or NPS can request in writing a reconsideration of the franchise fees. If an agreement cannot be reached on the adjustment within 120 days from the date of the request, the concessioner's position must be submitted in writing within 30 days to the Secretary to determine the appropriate fees. The concessioner may request that an advisory arbitration panel be established to recommend appropriate fees to the Secretary. The panel is to include one member selected by the Secretary, one selected by the concessioner, and a third selected by mutual agreement. The Secretary's written determination is final and binding upon both parties.

Although these procedures appear adequate, concessioners operating under contracts negotiated before the procedures were established can continue to refuse increases in the franchise fees as well as fees charged for the use of Government-owned buildings. For example, at Yosemite the Yosemite Park and Curry Company has refused NPS' request to raise its franchise fee from 0.75 percent to 1.75 percent and its building use fee from $5,000 to $19,899. The concessioner told NPS that it will not negotiate new fees until the park's general management plan is approved and a determination made as to what effect, if any, the plan's implementation will have on its profitability. In 1975 YPCC also refused to renegotiate its franchise fee rate, and we reported that correspondence in NPS' files indicated its unwillingness to promptly resolve franchise fee negotiation separate and apart from other considerations. Until YPCC's contract expires on September 30, 1996, NPS will not be in [75] a position to require an increase in the franchise fee rate or building use fee.

CONCLUSIONS

NPS has made little improvement since 1975 in its method of setting franchise fee rates. It appears that the rate structure established in 1965 no longer relates to the privileges granted concessioners under their contracts. Criteria have not been developed to consider economic factors, such as an acceptable rate of return on gross sales and investment and on the relative importance of gross sale, net profit, and return on investment that may warrant a higher or lower franchise fee. Under its franchise fee structure, NPS cannot assure that the rates charged

reflect the value of the contract to the concessioners, and NPS is spending a great deal of time determining what the rates should be. Also, NPS' field staff lacked individuals with the financial backgrounds needed to facilitate franchise fee rate determination.

NPS is taking steps to hire a consulting firm to develop the best approach for NPS to set franchise fee rates. We believe that the system developed should be easily understood and properly applied by NPS personnel who set the rates. If the new system provides for adjustment of individual rates based on economic factors, NPS should develop guidelines to assist its staff in making such adjustments. Also, NPS will have to provide its field offices with individuals that have the financial training and experience needed to understand and set franchise fee rates.

NPS' procedures for renegotiating franchise fee rates after specified periods during the term of the contract appear to be adequate. However, the procedures do not apply to existing contracts established before the new procedures were effective, and concessioners with these contracts could continue to refuse to negotiate new franchise fee provisions until their contracts expire. Most of the contracts will expire during 1980-84, but many others will not expire for a number of years.

RECOMMENDATIONS TO THE SECRETARY OF THE INTERIOR

We recommend that the Secretary of the Interior require the NPS Director to:

[76]

—Develop a new franchise fee rate system that reflects the value of privileges granted under concession contracts. The new system should be easily understood with a minimum amount of subjective analysis required so that NPS concession personnel may apply it properly. The system should be thoroughly supported and documented. In the future, the system should be reviewed periodically to determine if changes are needed.

—Develop specific criteria and procedures to help concessions management staff make appropriate adjustments to franchise fee rates, if the new rate-setting system allows adjustments [*sic*] rates based on pertinent economic factors.

—Take steps necessary to supply the concessions management field staff with individuals that have the financial background and experience needed to set equitable franchise fee rates and deal effectively with the other areas of concessions contracts.

AGENCY COMMENTS AND OUR RESPONSE

NPS stated that it is in the process of contracting to update and revise its existing franchise fee system and that the contractor will be required to recommend the best system for NPS. The contractor's recommendation is to be based on a study of NPS' current franchise fee system, shopping centers, and other Government agencies. According to NPS, upon completion of the contractor's study, NPS will establish a task force to implement the final system, taking

into consideration the recommendations in both our current report and our 1975 report.

We agree with NPS' decision to develop a new franchise fee system. However, we believe the contractor should consider our recommendation that the system be easily understood and subjective analysis be kept to a minimum before completion of its study. If the contractor is not made aware of the importance of developing such a system, it may recommend a good system but one that may be difficult for NPS personnel to implement, as has happened in the past.

NPS did not address our recommendation on the need to provide its field staff with individuals that have financial backgrounds and experience. We believe that such personnel will be necessary regardless of the type of system NPS develops.

[77]

CONCESSIONER COMMENTS AND OUR RESPONSE

In commenting on the franchise fee rate determination for the photographic studio at Yosemite, the concessioner stated that the meeting it had with the Director on November 27, 1978, did not take place unknown to NPS concession management officials in the field and at headquarters. The concessioner stated that the Director indicated that he had been briefed on the matter by NPS' Chief of the Concessions Management Division prior to the meeting.

Contrary to what the Director may have told the concessioner, the Chief of NPS' Concessions Management Division informed us that the concessions

management staff in the field and at headquarters were not aware of the Director's meeting with the concessioner until after it had occurred. He said that the Director modified the agreement he had made with the concessioner, from a 2-year period to a 1-year period, after discussing the matter with the concessions management staff and realizing the agreement should not have been made.

APPENDIX B

Chapter 24 of the Concessions Guidelines (NPS-48) provides in pertinent part as follows:

FINANCIAL ADMINISTRATION

* * * * *

D. FRANCHISE FEE

* * * * *

5. Procedures

Concessioners pay a franchise fee to the National Park Service for the privilege of operating which, according to Public Law 89-249, "shall be determined upon consideration of the probable value to the concessioner of the privileges granted by" the authorization. This value is "the opportunity for net profit in relation to both gross receipts and capital invested." Franchise fees are secondary to both preservation of the resources and service to the visitor.

* * * * *

g. FRANCHISE FEE RECONSIDERATION

Franchise fee determinations are made at various times before and during the term of the authorization. By law, they must be reconsidered at least every 5 years. The particular constraints and NPS leverage vary according to the reason and time of the consideration.

* * * * *

(2) **Reconsiderations**

Standard contract language has provisions whereby the franchise fees will be considered at periodic times during the contract. These times should be set so that there is no violation of the 5 year reconsideration requirement but it also provides the Park Service the opportunity to set reconsiderations at other appropriate times. This can be important when a new service is to be provided and there is no historical information as to the profitability. An initial fee determination can be made and then reconsidered after 2 years instead of waiting for five.

The old standard contract language requires that any decision to change a franchise fee during a reconsideration period must be mutually agreed to by both parties. That is, if either party does not agree, no change can be effected in the franchise fee.

Under the new standard contract language if both the Secretary and Concessioner cannot agree to an adjustment in franchise fees, the position of the Concessioner must be reduced to writing and submitted to the Secretary for a determination. If desired by the Concessioner, an advisory arbitration panel will be established for the purpose of recommending to the Secretary appropriate franchise fees. The written determination of the Secretary as to franchise fees shall be final and conclusive.

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No. 95-1353

In The

Supreme Court of the United States

October Term, 1995

FORT SUMTER TOURS, INC.,

Petitioner,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, the Petitioner, Fort Sumter Tours, Inc., respectfully submits this Reply to Respondent's Brief in Opposition ["Op. Cert."].

ARGUMENT

There is much common ground between Petitioner and the United States. It seems to be agreed that the proper construction of the National Park System Concessions Policy Act (CPA), 16 U.S.C. §§ 20-20g, is a question of some public interest and significance. Op. Cert. 1. The United States concurs that on the critical issue of whether the CPA authorizes the National Park Service (NPS) to unilaterally raise franchise fees for concession contracts already negotiated, the Fourth Circuit granted *Chevron* deference to the interpretation advanced by the agency. Op. Cert. 9. Respondent has also acknowledged that to the extent that NPS-48 is the source for the agency's position that it can unilaterally raise franchise fees, Op. Cert. 13, it is an informal guidance announcement not deserving of full judicial deference, Op. Cert. 9, an issue which has already secured the attention of two courts of appeal. *See Hotcaveg v. Kennedy*, 72 F.3d 133 (Table), 1995 WL 739991 (8th Cir. Dec. 15, 1995), cert. applied for March 14, 1996 (Docket No. 95-1480); *Lake Mohave Boat Owners Assoc. v. National Park Service*, 78 F.3d 1360, 1368 (9th Cir. 1996).

Despite these observations, the United States maintains that this case is unworthy of review because Petitioner agreed to concession language that seemingly permits NPS to unilaterally and dramatically raise franchise fees during the contract term, as occurred here.[1] That was not, however, the interpretation embraced by the agency at the time of contract. Prior to the adoption of NPS-48 on December 31, 1986, and amendments thereto in 1987, the agency itself interpreted the language appearing in section 9(e) of the concession contract as not granting NPS the authority to unilaterally force an increase in franchise fees. Most important, the court of appeals assumed in its decision that the agency had relied upon NPS-48 as the source of its authority, notwithstanding the agency's changed interpretation of the contract. See Pet. App. 14a.

Respondent's contention, moreover, misses the point of the Petition -- which is to place before this Court the question whether NPS ever had the statutory authority to unilaterally increase franchise fees in pursuance of a policy to limit concessioner profits. Petitioner's contention throughout has been that NPS simply arrogated that power, and did so chiefly by means of an internal guidance document, which (it was hoped by the agency) would avoid the public scrutiny of notice-and-comment and yet still command *Chevron* deference. The United States would apparently seek to promote this suspect form of agency law-making in this Court. Op. Cert. 9, 18.

[1] Respondent's suggestion, Op. Cert. 7, that Petitioner did not seek to discuss the fee increase with NPS is untrue. The Fourth Circuit noted there had been an exchange of letters on this point. See Pet. App. 3a.

NPS's extension of its regulatory power seems particularly egregious here since the agency was aware that it was operating beyond the orbit of its authority under the CPA. Somewhat ironically, it was the 1980 report of the Comptroller General (a previously unpublished document) that made this point clear to the agency by recommending that Congress should amend the CPA "to help improve the Park Service's ability to manage concessions operations." Op. Cert. 1a. Among the points to be cured by legislation was the authority of NPS to unilaterally raise franchise fees in order to limit concessioner profits. As this Court is well aware, the corrective legislation was never forthcoming and NPS decided on its own authority to achieve by guidance what was withheld from it by law, producing the events leading to this Petition.

If left unreviewed, this precedent will degrade the financial stability of National Park concessioners, diminish the quality of services available to park visitors, and give license to agency expansions of power unrestrained by effective judicial scrutiny.

CONCLUSION

For the foregoing reasons, along with those previously presented, the Petition should be GRANTED.

Respectfully submitted,

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